United States Court of Appeals for the Second Circuit



BRIEF FOR APPELLEE

76-7442 76-7451

To be argued by Peter Gruenberger

United States Court of Appeals

For the Second Circuit

OSCAR ROBERTSON, WILLIAM BRADLEY, JOE CALDWELL, ARCHIE CLARK, MEL COUNTS, JOHN HAVLICEK, DONALD KOJIS, JON McGLOCKLIN, McCOY McLIMORE, THOMAS MESCHERY, JEFFRY MULLINS, WESTLY UNSELD, RICHARD VAN ASSOCIATION and CHESTER WALKER, individually and as representatives of all present and future active players in the National Basketball Association,

Plaintiffs-Appellees

WILTON N. CHAMBERLAIN, CLIFFORD RAY and CHESTER WALKER,
Objectors-Appellants,

against

NATIONAL BASKETBALL ASSOCIATION, a joint venture, Madison Square Garden Center, Inc., Madison Square Garden Corporation, Milwaukee Professional Sports & Services, Inc., The Capital Bullets Basketball Club, Inc. (formerly The Baltimore Bullets Basketball Club, Inc.), Riko Enterprises, Inc., Kings Professional Basketball Club, Inc. (formerly Cincinnati Basketball Club Company), Boston Celtic Basketball Club, Inc. (formerly Trans National Communications, Inc.), Detroit Pistons Basketball Company (formerly Zollner Corporation), Atlanta Hawks Basketball, Inc., California Sports, Incorporated, The Chicago Professional Basketball Corporation, Phoenix Professional Basketball Club, Golden State Warriors (formerly San Francisco Warriors), Seattle Supersonics Corporation, Texas Sports Investments, Inc. (formerly San Diego Basketball Club), Buffalo Braves, Inc., Cleveland Professional Basketball Company, Pro Basketball, Inc., New Orleans Professional Basketball Club and American Basketball Association,

Defendants-Appellees.

On Appeal from a Judgment of the United States District Court for the Southern District of New York

BRIEF OF PLAINTIFFS-APPELLEES

Weil, Gotshal & Manges Attorneys for Plaintiffs-Appellees 767 Fifth Avenue New York, New York 10022 (212) 758-7800

IRA M. MILLSTEIN
PETER GRUENBERGER
JAMES W. QUINN
IRWIN H. WARREN
Of Counsel

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 76-7442 No. 76-7451

OSCAR ROBERTSON, et al.,

Plaintiffs-Appellees,

WILTON N. CHAMBERLAIN, CLIFFORD RAY and CHESTER WALKER,

Objectors-Appellants,

- against -

NATIONAL BASKETBALL ASSOCIATION, et al.,

Defendants-Appellees.

On Appeal From A Judgment Of The United States District Court For The Southern District Of New York

BRIEF OF PLAINTIFFS-APPELLEES

TABLE OF CONTENTS

	Page No.
TABLE OF AUTHORITIES	iii
ISSUES PRESENTED	vii
PRELIMINARY STATEMENT	1
STATEMENT OF FACTS	6
History of the Litigation	6
The Settlement	9
The Settlement Hearing and Opinion Below	12
ARGUMENT	
I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THE CLASS SETTLEMENT TO BE FAIR, REASONABLE AND ADEQUATE UNDER THE APPLICABLE LEGAL STANDARDS	13
 The Complexity, Expense and Extended Duration of This Litigation 	20
2. Favorable Class Reaction	22
3. Extensive Discovery Created a Massive Record	24
4. The Risks of Establishing Liability and Damages	26
5. The NBA Defendants' Financial Posture	29
6. The Substantial Settlement Fund	31

			Page No.
	7.	Considerations of Judicial Economy	35
II.	THI SEV PRA	S SETTLEMENT WHICH ELIMINATED OR ERELY MODIFIED THE CHALLENGED CTICES NO ILLEGALITY INHERES THE SETTLEMENT AGREEMENT	36
ı.	BRC DUE CLA	DISTRICT COURT DID NOT ABUSE ITS DAD DISCRETION OR VIOLATE OBJECTORS' PROCESS RIGHTS BY CERTIFYING THIS ASS PURSUANT TO RULE 23(b)(1)(A) and (1)(B)	50
	Α.	Certification Under Rule 23(b)(1)(A) and (B) Was Proper	51
	в.	Objectors' Due Process Rights Have Been Fully Protected	61

Table of Authorities

Cases:	Page
Air Line Stewards and Stewardesses Ass'n, Local 550, TWU, AFL-CIO v. American Airlines, Inc., 490 F.2d 636 (7th Cir. 1973), Cert. denied, 416 U.S. 993 (1974)	68-70
Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc., 1973-1 CCH Trade Cases ¶74,350 (S.D.N.Y. 1972), aff'd, 481 F.2d 1045 (2d Cir.), cert. denied, 414 U.S. 1092 (1973)	35
American Can Co. v. Russellville Canning Co., 191 F.2d 38 (8th Cir. 1951)	28
American Employers' Insurance Co. v. King Resources Co., 20 F.R.Serv.2d 161 (D.Colo. 1975)	54, 64-67
Berman v. Narragansett Racing Ass'n, 48 F.R.D. 333 (D.R.I. 1969)	54, 56
Blank v. Talley Industries, Inc., 64 F.R.D. 125 (S.D.N.Y. 1974)	24
Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971)	60-61
Boggess v. Hogan, 700 F.Supp. 433 (N.D.III. 1975)	67
Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799 (3rd Cir.), cert. denied, 419 U.S. 900 (1974)	23
Cannon v. Texas Gulf Sulphur Co., 55 F.R.D. 308 (S.D.N.Y. 1972)	24, 28
Cass Clay, Inc. v. Northwestern Public Service Co., 18 F.R.Serv.2d 1187 (D.S.D. 1974)	54
Chevalier v. Baird Savings Association, 1976-2 Trade Cases ¶61,126 (E.D.Pa. 1976)	61
City of Detroit v. Grinnell Corp., 356 F.Supp. 1380 (S.D.N.Y. 1972), aff'd, 495 F.2d 448 (2d Cir. 1974)	14, 16-18, 20-23, 25-29, 33-35, 38-39, 41, 44, 48, 63

Cases:	Page
Cook Investment Co. v. Harvey, 20 F.R.Serv.2d 612 (N.D.Ohio 1975)	54
Cranston v. Hardin, 504 F.2d 566 (2d Cir. 1974)	48-49
Dale Electronics, Inc. v. R.C.L. Electronics, Inc., 53 F.R.D. 531 (D.N.H. 1971)	60-61
Feder v. Harrington, 58 F.R.D. 171 (S.D.N.Y. 1972)	15-16
Flinn v. FMC Corp., 528 F.2d 1169 (4th Cir. 1975), cert. denied, 424 U.S. 967 (1976)	14, 16, 23-25, 67
Glicken v. Bradford, 35 F.R.D. 144 (S.D.N.Y. 1964)	24
Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973)	69
Green v. Occidental Petroleum Corp., 541 F.2d 1335 (9th Cir. 1976)	57-58
Greenspun v. <u>Bogan</u> , 492 F.2d 375 (1st Cir. 1974)	14
Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir.), cert. denied, 423 U.S. 864 (1975)	14, 29, 39-42, 44, 46
Hansberry v. Lee, 311 U.S. 32 (1940)	61-63, 66-67
In re Antibiotic Antitrust Actions, 333 F.Supp. 296 (S.D.N.Y.), aff'd per curiam sub nom., Connors v. Chas. Pfizer & Co., 450 F.2d 1119 (2d Cir. 1971)	67
In re Four Seasons Securities Laws Litigation, 59 F.R.D. 667 (W.D.Okla. 1973), rev'd on other grounds, 502 F.2d 834 (10th Cir.), cert. denied, 419 U.S. 1034 (1974)	15, 64

Cases:	Page
In re International House of Pancakes, 487 F.2d 303 (8th Cir. 1973)	39
In re National Student Marketing Litigation, 68 F.R.D. 151 (D.D.C. 1974)	29, 30
In re Piper Aircraft Distribution System Antitrust Litigation, 411 F.Supp. 115 (W.D.Mo. 1976)	61
In re Yarn Processing Patent Litigation, 56 F.R.D. 648 (S.D.Fla. 1972)	60
Jacobi v. Bache & Co., Inc., 16 F.R.Serv.2d 70 (S.D.N.Y. 1971)	56
Josephson v. Campbell 1967-69 CCH Fed.Sec.L.Rep. ¶92,347 (S.D.N.Y. 1969)	14-15
Kansas City Royals Baseball Corp. v. Major League Baseball Players, 532 F.2d 615 (8th Cir. 1976)	24
<pre>Kapp v. National Football League, No. C-72-537 (N.D.Cal. 1976)</pre>	28, 34
Larionoff v. United States, 365 F.Supp. 140 (D.D.C. 1973), aff'd in part, remanded on other issue, 533 F.2d 1167, reh. denied, 533 F.2d 1188 (D.C. Cir. 1976)	53-55
Mackey v. National Football League, 407 F.Supp. 1000 (D.Minn. 1975), aff'd, 543 F.2d 606 (8th Cir. 1976)	21, 24, 27, 41-44, 46-47, 49-50
Muldrow v. H.K. Porter Co., 20 F.R.Serv.2d 1069 (N.D.Ala. 1975)	23, 38
Mungin v. Florida East Coast Ry. Co., 318 F.Supp. 720 (M.D.Fla. 1970), aff'd per curiam, 441 F.2d 728 (5th Cir.), cert. denied, 404 U.S. 897 (1971)	55-56, 59
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)	64

Cases:	Page
National Association of Regional Medical Programs, Inc., v. Weinberger, 396 F.Supp. 842 (D.D.C. 1975)	67-68
Newman v. Stein, 464 F.2d 689 (2d Cir.), cert. denied, 409 U.S. 1039 (1972)	14
Northern Pacific Ry. Co. v. United States, 356 U.S. 1 (1958)	40
Piccard v. Sperry Corp., 36 F.Supp. 1006 (S.D.N.Y.), aff'd, 120 F.2d 328 (2d Cir. 1941)	27
Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414 (1968)	29
Research Corp. v. Asgrow Seed Co., 425 F.2d 1059 (7th Cir. 1970)	65
Robertson v. National Basketball Association, 389 F. Supp. 867 (S.D.N.Y. 1975)	7-8, 27, 45-46, 48-49 51-53, 55, 61-62
Saylor v. Lindsley, 456 F.2d 896 (2d Cir. 1972)	67
Smith v. Pro-Football, 420 F.Supp. 738 (D.D.C. 1976)	34, 42-44, 49
State of Minnesota v. United States Steel Corp., 44 F.R.D. 559 (D.Minn. 1968)	54, 56
State of West Virginia v. Chas. Pfizer & Co., 314 F.Supp. 710 (S.D.N.Y. 1970), aff'd, 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971)	14-15, 26-27, 38
Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp., 178 F.2d 150 (2d Cir. 1949)	28
Sunrise Toyota, Ltd. v. Toyota Motor Co., Ltd., 1973-1 CCH Trade Cases ¶74,398 (S.D.N.Y. 1973)	16
Upson v. Otis, 155 F.2d 606 (2d Cir. 1946)	27
Van Gemert v. Boeing Co., 259 F.Supp. 125 (S.D.N.Y. 1966)	56

Cases:		Page
Young v. Katz, 4	147 F.2d 431 (5th Cir. 1971)	39
Zachary v. Chase 52 F.R.D. 532 (S	Manhattan Bank S.D.N.Y. 1971)	56
Zerkle v. Clevel 52 F.R.D. 151 (S	land-Cliffs Iron Co., S.D.N.Y. 1971)	24
Federal Rules:		
Federal Rules of	f Civil Procedure	
	23(b)(1)	5, 9, 18-20, 51, 53-61, 64, 67-68
	23(b)(1)(A)	1, 7, 50-52, 55-56, 58-59, 61
	23(b)(1)(B)	1, 7, 50-52, 57, 59, 61
	23(b)(2)	54
	23(b)(3)	51, 54-56, 58-59 66-67
	23(c)(2)	66
	23(e)	66
Other Authoriti	es:	
3B Moore's Pede	ral Practice ¶23.31[3]	56
United States, Procedure for t	Proposed Rules of Civil the United States District y Committee Note)	53-54, 58-59
7A Wright & Mil Procedure, Civi	ler, Federal Fractice and [1] §1789 (1972)	60

ISSUES PRESENTED

- 1. Have appellants satisfied their burden of making a clear showing that the District Court abused its discretion in finding the settlement to be fair, reasonable and adequate? (This issue is dealt with in this Brief at pp. 13-36 and in the Brief of To fendants-Appellees at pp.15-41.)
- 2. Can appellants overturn this settlement, which was the product of arm's-length negotiations, on the basis of a contention that it contains "likely" violations of the Sherman Act where the settlement eliminates or severely modifies challenged practices which the Court below had refused to hold were per se illegal? (This issue is dealt with in this Brief at pp. 36-50 and in the Brief of Defendants-Appellees at pp. 21-41.)
- 3. Can individual class members, including a named plaintiff and another class member both of whom expressly authorized the commencement of this class action, after having benefitted from the pendency and settlement of this suit, challenge on this appeal the correctness of the earlier Rule 23(b)(1) class action certification? (This issue is dealt with in the Brief of Defendants-Appellees at pp. 41-52.)
- 4. Did the District Court properly certify this action as a class action pursuant to Rule 23(b)(1) and afford adequate notice and opportunity to object to the

settlement so as to afford class members due process? (This issue is dealt with in this Brief at pp. 50-70.)

- 5. Can the preliminary injunctions issued by the District Court enjoining prosecution by individual class members of subsequent actions attacking the legality of certain aspects of the National Basketball Association's player allocation system be challenged on this appeal from a final judgment? (This issue is dealt with in the Brief of Defendants-Appellees at pp.53-54 and 59-69.)
- 6. Can the <u>res judicata</u> effect of the judgment below be determined on this appeal? (This issue is dealt with in the Brief of Defendants-Appellees at p. 55.)

PRELIMINARY STATEMENT

This is an appeal by three class members -- Wilton N. Chamberlain, Chester Walker and Clifford Ray ("objectors") -- from the final judgment entered below on August 4, 1976 (JA 1807)* by District Judge Robert L. Carter approving this class action settlement in all respects, as fair, reasonable and adequate.

The <u>Robertson</u> settlement has brought antitrust peace to professional basketball as the culmination of a legal battle which began nearly seven years ago and which has been bitterly contested by all National Basketball Association ("NBA") players against the owners before the courts, the Congress and the National Labor Relations Board. This class action for injunctive relief and damages was filed in April 1970 upon the express written authorization of the then players in the NBA seeking under Sections 1 and 2 of the Sherman Act (1) to enjoin further application of the NBA's player allocation system, which in the players' view stifled all competition for

^{*} All references herein are designated as follows: to the Joint Appendix as "JA"; to the Joint Brief of Appellants on the Common Issues as "J. Br."; to Appellant Chamberlain's Supplemental Brief as "Supp. Br."; to the Brief of Defendants—Appellees as "NBA Br."; to Judge Carter's July 30, 1976 Opinion approving the settlement as "Opinion"; to Judge Carter's February 14, 1975 Opinion certifying the class as a Rule 23(b)(1)(A) and (B) class as "389 F.Supp. "; and to the June 23, 1976 settlement hearing as "Hearing."

their services within the NBA and prevented any player from negotiating with more than one NBA team at any time during his professional basketball career; (2) damages resulting from such intra-league restraints; and (3) so long as these intra-league restraints existed, to prevent the then imminent merger of the NBA with the competing American Basketball Association ("ABA"), which would have eliminated all inter-league competition for players' services. Each of these goals has now been met during the pendency of this litigation and finally by the settlement approved below by Judge Carter, who, following the six years of litigation, found:

"The proposed settlement constitutes a negotiated compromise which fairly seeks to protect the interests of both the players and the club owners. It should make for an era of peace and stability in professional basketball for many years to come." (Opinion, JA 1685)

The stakes on this appeal are enormous for the class. The settlement provides for payment by the NBA defendants of \$4.3 million as a settlement fund with respect to the past NBA practices plus all of the class' attorneys' fees and costs, and also accomplishes a total overhaul of the NEA's player allocation system, which will ensure increased competition and economic benefits for all present and future NBA players.

The Settlement Agreement (JA 857) not only thus benefits past, present and future NBA players, but also (1) has led directly to the entry into a long term (highly beneficial

for all players) collective bargaining agreement between the National Basketball Players Association ("Players Association") and the owners, and (2) facilitated the absorption of the four remaining ABA teams into the NBA, thus creating jobs for about fifty players, which otherwise would have been lost.* If this settlement is upset at the behest of these objectors, the monetary and already applicable injunctive benefits to the class will be lost (JA 862-63); a long, expensive and risky jury trial with no guarantee of success will be forced upon 479 players;** the collective bargaining agreement will automatically collapse (JA 1298), the NBA players will be required to seek an unscrambling of the absorption of the ABA teams into the NBA and the entire professional basketball world will be thrown back into turmoil.

^{*} In late 1975 four of the ten ABA teams folded, causing the immediate loss of jobs for about fifty other players. See Amicus Curiae Brief filed by the ABA and ABA Players Association. Also, in 1975 the World Football League collapsed (JA 1297), and even this year teams in both professional hockey leagues have failed to meet payrolls and in some instances folded.

^{**} The NBA defendants have, in support of the decision below approving the settlement, advanced their reasonableness and collective bargaining defenses at some length (NBA Br. 21-41), in an effort to show that they would have won the liability issues had the case been tried. Plaintiffs still vigorously disagree with the NBA defendants' characterization of the facts and presentation of the law regarding these defenses, and hope that the NBA defendants' view of the facts and law will not be confirmed in any opinion that might be written by this Court. Indeed, the Settlement Agreement expressly provides that neither party agrees with the substantive contentions advanced by the other (JA 861, 901-03).

The class of 479 present and former NBA players has overwhelmingly expressed approval of the settlement. Only three class members filed objections, and only two of them, both former players who expressly authorized commencement of this suit, have even tried to state reasons for these objections.*

Messrs. Chamberlain and Walker, whose attorneys have stated on the record below that they have no objections to the settlement, each now lists several belated objections to the settlement to justify their expressed desire to prosecute their own individual actions for injuries claimed to be unique only to them. Indeed, they filed separate lawsuits almost on the eve of the scheduled trial below, just prior to announcement of a settlement in principle, complaining of the same practices challenged in the Robertson complaint (JA 680, 806). Both such lawsuits were enjoined by the District Court upon motion of the NBA defendants (JA 850, 1347).**

^{*} No reasons whatever were given below for Clifford Ray's putative objection to the settlement by his counsel, Richard G. Faillips, who also represents objector Walker (Hearing, JA 1040-41, 1656-57). As discussed below, Ray's objection and therefore his appeal are a legal nullity.

^{**} The factual circumstances leading to and the merits and demerits of these individual actions are contained in the record below (JA 1256-70; 1299-1300; 1312-13; 1320-22; 1332-34). As shown in the brief of the NBA defendants (NBA Br. 9-14), Walker (aged 37) and Chamberlain (aged 40) refused to play under their guaranteed contracts in 1975, but later decided to bring separate antitrust actions seeking to recover the sums provided for in those contracts (JA 1256-72; Hearing, JA 1648-49).

In seeking to promote their ability to bring these alleged unique claims in forums different than the one they as class members originally selected, and after supporting and accepting all the benefits of the <u>Robertson</u> litigation, objectors now claim that their settlement shares are inadequate, that the settlement terms might be illegal and that the effect of the judgment below in this class action should not be binding on them.

As will be shown below, the District Court properly held that none of the objections has any legal or factual merit. On the contrary, the applicable law and the undisputed facts set forth in the voluminous record demonstrate that: Judge Carter did not abuse his broad discretion in finding, after years of supervising this litigation, that the terms of the Robertson settlement are eminently fair, reasonable and adequate as to all named plaintiffs and class members, including the objectors, under the applicable standards governing class action settlements (Point I, infra); no grounds exist for the objectors' challenge to the terms of the settlement as perpetuating or creating "likely" illegal restraints (Point II, infra); and the District Court properly determined that this action should be maintained as a Rule 23(b)(1) class action so as to avoid inconsistent results and any prejudice to the interests of all class members and defendants, and scrupulously protected the due process rights of all class members throughout this litigation, including the settlement stage (Point III, infra).

STATEMENT OF FACTS

History of the Litigation*

This class action was commenced on April 16, 1970 against the NBA, its then 14 teams and the ABA on behalf of all then present NBA players and all other persons who would become NBA players prior to the date of the final judgment (JA 912). The initiation of such a class suit for both injunctive relief and damages was authorized in writing by every then NBA player, but one** (JA 1294), including appellants Walker, a named plaintiff (JA 816), and Chamberlain (JA 680(x)).***

When this action was originally filed, plaintiffs sought and obtained from the District Court on behalf of the class a temporary restraining order and preliminary injunction prohibiting any merger or consolidation of the NBA and ABA and

^{*} What follows is but a brief summary of this litigation. The complete history is set out in detail in the record and particularly in class counsel's unrebutted affidavits below in Support of Application for Attorneys' Fees, Costs and Disbursements (JA 1079-1104) and in Further Support of Settlement and in Opposition to Objections of Chester Walker, Wilton N. Chamberlain and Clifford Ray (JA 1244 et seq.).

^{**} That one player, Connie Hawkins, was precluded from doing so by the settlement of a prior antitrust suit. He nonetheless shares in the settlement herein.

^{***} The representative plaintiffs were the 14 elected player representatives to the Players Association -- one from each team in the NBA. Later amendments to the complaint added new NBA teams as defendants and added practices later discovered.

any non-competition agreement between them (JA 1, 48). The NBA and ABA thereafter sought an exemption under the antitrust laws from Congress for their merger, as had been accomplished for the professional football leagues only a few years earlier. After two years of hearings involving extensive participation by plaintiffs and other class members and their counsel, the exemption was denied because the NBA's intra-league practices would have remained intact and unmodified (JA 1087-88). The denial of the exemption insured that inter-league competition for players' services was maintained by the injunction for the duration of the suit, resulting in greatly increased salaries for all class members (JA 1086; 1248-49).

Thereafter, the case proceeded against the intraleague restraints. Plaintiffs moved for class certification
and defendants cross-moved for summary judgment and dismissal.

In view of plaintiffs' demand for (1) industry-wide relief
against the system of NBA league rules and uniform contracts
applicable to all players and (2) a permanent injunction
against merger of the NBA and ABA, Judge Carter expressly
certified the class pursuant to both Rule 23(b)(1)(A) and
(B) (389 F. Supp. 867, at 901-03 (S.D.N.Y. 1975)). Notice
of Pendency of Class Action was sent to all class members,
including appellants, long before any settlement was reached
(JA 534, 537, 546, 555). Judge Carter denied defendants'
motions for summary judgment and dismissal. While rejecting

many of the defendants' arguments, he left open <u>for trial</u> several potential defenses which would turn on resolution of various issues of fact relating, <u>inter alia</u>, to the history of collective bargaining between the NBA and the Players Association and the alleged reasonableness of the challenged practices (389 F. Supp. at 895-96; JA 504-07, 523-24). These rulings were followed by nearly a year of extraordinarily intense discovery, discussed <u>infra</u> at 24-26, of the type seldom before seen in a class action (JA 1094-98).

As discovery in <u>Robertson</u> came to a close, Chamber-lain and Walker, both of whom had retired from basketball, commenced their two separate lawsuits. Even though Chamber-lain had expressly authorized this class action in writing, in December 1975 he filed an antitrust action in California following a dispute with the Los Angeles Lakers of the NBA concerning his playing obligations and status under his contract. Walker, also apparently dissatisfied with his contract negotiations with his NBA team, the Chicago Bulls, filed an antitrust action in Pennsylvania even though he was and had been a named plaintiff in <u>Robertson</u> for six years and also had expressly authorized this class action in writing. Since both complaints contained allegations virtually identical to those in <u>Robertson</u> (JA 680, 806), Judge Carter, on motion of the NBA defendants, enjoined prosecution of both actions,

in order

"to prevent impairment of this court's jurisdiction and to prevent the possibility of inconsistent rulings or relief from being rendered by another court, the very reason Walker, and the other named plaintiffs in the Robertson action sought the Robertson action to be certified as a Rule 23(b)(1) class action." (JA 848; see also JA 1346-47.)

The Settlement

On the eve of completion of discovery and with trial only a faw months away, settlement talks convened in January 1976 (JA 1103). Significantly, the negotiations were conducted for the class not only by class counsel but by three named plaintiffs (Oscar Robertson, John Havlicek and Jeffry Mullins), two class members (Paul Silas and Jim McMillian)* and Lawrence Fleisher, general counsel to the Players Association (JA 1297). A settlement in principle was announced on February 2, 1976 (JA 1168)** and was unanimously approved by the elected player representatives of all NBA teams (JA 1297). After nearly three more months of intensive negotiations and drafting, the Settlement Agreement, dated April 29, 1976, was submitted to the Court below, which scheduled a hearing for any objections to the settlement for June 23, 1976 (JA

^{*} Robertson already had retired; Mullins was in his last season and has since retired. The others are still active players.

^{**} Appellants incorrectly set the date of this agreement in principle as February 21, 1976 (J. Br. 2; Supp. Br. 11), presumably because of a typographical error contained in the Court's opinion below (Opinion, JA 1670).

1123-25). Notice of Class Action Settlement (JA 1043) was mailed to every one of the 479 class members on May 5, 1976 (JA 1161).

The settlement met virtually all the goals of the lawsuit and was acclaimed as the dawning of a new era in professional sports (JA 1207-10).* First, the settlement provides for payment by the NBA defendants of \$4.3 million to a class of only 479, an average of more than \$9000 per class member (JA 888, 1249-50). Because the NBA defendants also will pay all legal fees, costs and disbursements incurred by the class in the now nearly seven-year litigation, the Court below found that the total monetary benefit to the class contained in the settlement actually exceeds \$5 million (Opinion, JA 1679), in addition to past and future monetary gains for all players resulting from elimination and modification of the restraints. The fund is allocated so that class members who played in the earlier years of the damage period -- the period of least competition for players' services and, hence, lowest salaries -- receive a greater share of the fund

^{*} Several major goals were met during the pendency of the suit from 1970 through 1976. E.g., in maintaining interleague competition by blocking the NBA-ABA merger from 1970-76, class members' salaries increased from a median of \$35,000 in 1970 to approximately \$100,000 today (JA 1105), thus benefitting the class in the aggregate by a minimum of some \$10 million. In contrast, salaries in professional football dropped sharply after the rival leagues merged (JA 1105). In addition, the NBA significantly modified one of the challenged practices, the reserve clause, during the pendency of the action so as to increase competition for players' services. (See infra at 11, 44-45.)

than those who played in the recent, more competitive years. Thus, Chamberlain will receive nearly \$27,000, and Walker nearly \$29,000 (JA 1374, 1390).

The settlement totally restructures the player allocation system in the NBA as briefly summarized below, so as to recognize and protect players' economic rights.* When the action began, NBA contracts contained a perpetual reserve clause tying a player to one team for life. This was modified by the NBA during the course of — and in direct response to — this lawsuit, so as to provide only for a one-year option (JA 1251-52). As a result of the settlement, such one-year option clauses, including those appearing in outstanding contracts pre-dating the settlement, were eliminated (JA 870-73). In addition, the NBA compensation rule will be phased out over the next four seasons (JA 873-76).** Thereafter, a "right of first refusal" will apply which permits a player to negotiate with every team in the league at the conclusion of

^{*} These far reaching provisions of the Settlement Agreement are described in detail in the unrebutted record submitted below in support of the settlement (JA 1107-09; 1249-53) and the Notice of Class Action Settlement sent to all class members (JA 1044-49), which include a full discussion of these and all the other benefits which the settlement affords class members.

^{**} That compensation rule provides that after a player has completed his contract term, including any option year, and has signed a contract with a new team, his old team may seek (and the NBA commissioner may award) compensation from the new team for the loss of that player (JA 873-74).

his contract and guarantees that he will play for the highest salary offered (JA 873-88). The old perpetual college draft has been eliminated and replaced with limited one year draft rights (JA 863-69). The negotiating positions of rookie players thus have been greatly improved while the economic responsibility owed by NBA teams to such players has been substantially increased (TA 863-69, 911(a)).* In addition, these challenged restraints may never be reimposed by the NBA (JA 901). Finally, the District Court has preserved jurisdiction to oversee enforcement of the Settlement Agreement to protect players' rights through the appointment of a Special Master who will hear disputes on an expedited basis, subject to review (JA 905-07).

The Settlement Hearing And Opinion Below

Despite the fact that most class members have independent and informed counsel (JA 1246), only three of the 479 objected in any way to the settlement.

On June 7, 1976, 16 months after certification of this (b)(1) class, objectors Walker and Ray each filed through the same attorney identical one-page notices requesting "exclusion" from the settlement (JA 1242-43). The following

^{*} Indeed, at plaintiffs' insistence and at the risk of upsetting the entire agreement, the settlement was amended with court approval after its submission so as to provide greater economic protection to college players drafted by the NBA (JA 911(a); Opinion, JA 1680-81 and n.1).

day, June 8, 1976, Chamberlain's counsel submitted a list of purported objections to the settlement (JA 1226). No affidavits were filed on behalf of any of the object Walker appeared at the hearing and he testified game ally as to his unhappiness with his settlement share without presenting any facts whatsoever. Thus, not one of those objectors introduced any evidence of any alleged unfairness of the settlement terms either in general or as to himself in particular. * Both plaintiffs and the NBA defendants, on the other hand, submitted extensive and unrebutted proof concerning the settlement generally and the particular issues raised by (and facts concerning) each of the objectors (JA 1244-1336). The District Court overruled the object ons, a pressly finding that the settlement met each standard projulgated by this Court (Hearing, JA 1660-61), and approved the settlement (Opinion, JA 1675-85). This appeal followed

RGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THE CLASS SETTLEMENT TO BE FAIR, REASONABLE AND ADEQUATE UNDER THE APPLICABLE LEGAL STANDARDS.

This Court has consistently made it clear that it will not disturb or otherwise intervene in a judicially

^{*} See discussion infra at pp. 15-19.

sanctioned class action settlement unless an objector makes "a clear showing that the District Court has abused its discretion." City of Detroit v. Grinnell Corp., 495 F.2d 448, 455 (2d Cir. 1974).* The Grinnell court aptly described the standard to be applied in the instant case:

"'Great weight is accorded his [the trial judge's] views because he is exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly.'" (Id. at 454)

Here, the District Court "has been involved in hearings, arguments, conferences and an analysis of a massive amount of material submitted by the parties which have served to enlighten and familiarize the court with all facets of the complex issues involved in this litigation" (Opinion, JA 1668).**

The courts have recognized that there is a "strong initial presumption that the compromise is fair and reason-

^{*} See also, Newman v. Stein, 464 F.2d 689, 692 (2d Cir.), cert. denied, 409 U.S. 1039 (1972); State of West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1085, n. 1 (2d Cir.), cert. denied, 404 U.S. 871 (1971). The rule is the same in other circuits. See, e.g., Flinn v. FMC Corp., 528 F.2d 1169, 1172 (4th Cir. 1975), cert. denied, 424 U.S. 967 (1976); Grunin v. International House of Pancakes, 513 F.2d 114, 123 (8th Cir.), cert. denied, 423 U.S. 864 (1975); Greenspun v. Bogan, 492 F.2d 375, 381 (1st Cir. 1974).

^{**} In the almost seven-year history of this litigation, there were more than thirty hearings and conferences before the District Court and numerous motions dealing directly with the merits of this case (e.g., JA 1082-1109).

able, "* and there is a strong judicial and public policy favoring settlements in complicated antitrust cases such as this one. ** Judge Carter correctly applied these salutary principles (Opinion, JA 1676). ***

Appellees satisfied their initial burden below of coming forward to show the fairness, reasonableness and adequacy of this class action settlement, under the applicable rule that:

"The proponents of the settlement should have the burden of proving: (1) that it is not collusive but was arrived at after arm's length negotiation; (2) that the proponents are counsel experienced in similar cases; (3) that there had been sufficient discovery to enable counsel to act intelligently; and (4) that the number of objectants or their relative interest is small.

^{* &}lt;u>Josephson v. Campbell</u>, 1967-69 CCH Fed. Sec. L. Rep. ¶92,347 at p. 97,658 (S.D.N.Y. 1969); <u>Feder v. Harrington</u>, 58 F.R.D. 171,174 (S.D.N.Y. 1972).

^{**} State of West Virginia v. Chas. Pfizer & Co., supra, 440 F.2d at 1085; see also, In re Four Seasons Securities Laws Litigation, 59 F.R.D. 667, 677-78 (W.D. Okla. 1973), rev'd on other grounds, 502 F.2d 834 (10th Cir.), cert. denied, 419 U.S. 1034 (1974).

^{*** &}quot;The settlement hearing is not '"a trial or a rehearsal of the trial" Saylor v. Lindsley, 456 F.2d 896, 904 (2d Cir. 1972), quoting, Haudek, The Settlement and Dismissal of Stockholders' Actions — Part II: The Settlement, 23 Sw. L.J. 765, 771 (1969). The function of the court is to canvass the relevant factors necessary to render an informed judgment as to the lairness, reasonableness, wisdom and adequacy of the proffered termination of the action. West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710, 740 (S.D.N.Y. 1970), aff'd 440 F.2d 1079, 1086 (2d Cir. 1971), aff'd 404 U.S. 548 (1972). It does not attempt to decide the merits of the controversy. Ibid.; United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826, 849 (5th Cir. 1975)." (Opinion, JA 1677)

"If the proponents establish the foregoing facts, then the same presumption in favor of a settlement should prevail as in any normal case, and the burden of attacking the settlement should prevail as upon the objectant."

Feder v. Harrington, supra, 58 F.R.D. at 174-75 (footnotes omitted). See also, Flinn v. FMC Corp., supra, 528 F.2d at 1173; Sunrise Toyota, Ltd. v. Toyota Motor Co., Ltd., 1973-1 CCH Trade Cases ¶74,398 at p. 93,821 (S.D.N.Y. 1973). All four factors were easily met (JA 1082-1109; 1244-1336).*

Indeed, not one was even challenged by the objectors below or on this appeal.

Consequently, the burden of persuasion below shifted to the objectors. This Court in <u>Grinnell</u> made it clear that objectors such as these must do much more than sit on their hands** and then at the last minute try to serve their own

^{* (1)} There is not and could not be any allegation of collusion here since the settlement resulted from months of intense arm's-length negotiations in which a representative group of class members, active and retired players, actively participated (Opinion, JA 1682);

⁽²⁾ counsel for both sides have been involved in many large and complex antitrust class actions and settlements (JA 1286, 1288);

⁽³⁾ the record amassed in discovery and relied upon by the proponents of the settlement was enormous, including well over one hundred depositions, thousands of interrogatories and hundreds of thousands of documents (JA 1094-1101; 1262-63; Opinion, JA 1669); and

⁽⁴⁾ only 3 of the 479 class members objected.

^{**} Judge Carter specifically found that objector Walker had consciously failed even to look at the massive discovery record when he sought to delay the settlement hearing (JA 1164-66).

ends through an objection as occurred here. Rather, objectors must affirmatively present evidence of specific and legally cognizable inadequacies in the settlement:

"In general the position taken by the objectors is that by merely objecting, they are entitled to stop the settlement in its tracks, without demonstrating any factual basis for their objections, and to force the parties to expend large amounts of time, money and effort to answer their rhetorical questions, notwithstanding the copious discovery available from years of prior litigation and extensive pre-trial proceedings. To allow the objectors to disrupt the settlement on the basis of nothing more than their unsupported suppositions would completely thwart the settlement process. On their theory no class action would ever be settled, so long as there was at least a single lawyer around who would like to replace counsel for the class and start the case anew. To permit the objectors to manipulate the distribution of the burden of proof to achieve such an end would be to permit too much. Although the parties reaching the settlement have the obligation to support their conclusion to the satisfaction of the District Court, once they have done so, they are not under any recurring obligation to take up their burden again and again ad infinitum unless the objectors have made a clear and specific showing that vital material was ignored by the District Court." (495 F.2d at 464) (Emphasis supplied).

Under this test, the objectors' complaints of unfairness and inadequacy must be rejected for they failed below or here to come forward with any facts, much less to make a clear showing, to support a single example of any unfairness and/or inadequacy (Hearing, JA 1613-14; Opinion, JA 1671).

No affidavit, evidence or statement was ever submitted by objector Ray setting forth why he objected or why in the eight months after receiving the Notice of Pendency of Class Action he had failed to intervene in the action or challenge the Rule 23(b)(1) determination.*

Likewise, no affidavit, testimony or other evidence concerning the settlement, either generally or as applied to Chamberlain, was ever introduced in Chamberlain's behalf, nor did he appear at the settlement hearing. Chamberlain's counsel at the settlement hearing merely asked the District Court to rely on affidavits submitted in connection with the prior injunction against his California action (Hearing, JA 1657-58). All of these had been submitted prior to the entry into the settlement and in no way dealt with its fairness or adequacy. Indeed, at the hearing, Chamberlain's counsel expressly approved of class counsel's representation of the class and the settlement's fairness to the class (Hearing, JA 1627). He complained only that Chamberlain should be permitted to

^{*} At the settlement hearing, Ray's counsel without explanation offered his former contract -- and nothing else -- in evidence (Hearing, JA 1639-41, 1656-57). Ray did not appear at the hearing. Since Ray failed to specify the nature of his objections, if any, to the District Court, his request for exclusion or notice of objection, etc. was properly treated as a nullity. See Grinnell, supra, 495 F.2d at 464.

prosecute his separate suit (Hearing, JA 1627) and should not be bound by a Rule 23(b)(1) settlement.*

While Walker purported to object to his share of the settlement fund as well as to the adequacy of the injunctive relief provided by the settlement (Hearing, JA 1623-24; 1650), Walker submitted no affidavit or any other evidence. He did concede at the settlement hearing, however, that he was continuously kept apprised of the purposes of and participated in the action, and that had he not refused to make himself available to play for his team, he could have earned all the money he now claims should have come to him in the settlement (Hearing, JA 1641-49).

Thus, no effort was made by the objectors to rebut the proponents' showing that the entire class, including objectors, has been greatly benefitted both by prosecution of the action and its settlement.**

On this appeal, the objectors attack the District Court's finding of fairness and adequacy on essentially two

^{*} Judge Carter expressly found that counsel for Chamberlain "had no other objection to the settlement" (Opinion, JA 1674).

^{**} Since "[n]o affidavit reciting any factual support for the objections was filed by any of the objectors" (Opinion, JA 1671), the Court below expressed its belief that these objectors lacked standing to raise their objections (Hearing, JA 1613-14; 1661). Nonetheless, the District Court proceeded to review the record and "to make a decision on the merits" (Hearing, JA 1661; Opinion, JA 1667-85).

grounds:* (1) asserted inadequacy of the settlement amounts allocable to each of them (discussed in Point I.6, <u>infra</u>) and (2) alleged "likely" antitrust illegality of certain provisions in the settlement agreement (discussed in Point II, <u>infra</u>). However, there is absolutely no support anywhere in the record or in law to substantiate these claims. Here, each <u>Grinnell</u> criterion (<u>see</u> 495 F.2d at 463 <u>et seq</u>. and the opinion of Judge Metzner below in <u>Grinnell</u>, 356 F. Supp. 1380, 1383 <u>et seq</u>. (S.D.N.Y. 1972)) was properly applied by Judge Carter in finding this settlement fair, reasonable and adelate.** These critical factors are:

 The Complexity, Expense And Extended Duration Of This Litigation

At the time of settlement, this case, which indisputably olves many complicated and novel legal and factual claims and Jefenses, had already been actively proceeding for more than six years in the courts, in Congress and before the NLRB at an enormous expense to both sides (JA 1082-1114).

^{*} The appellants' other objections relating to the propriety of the District Court's Rule 23(b)(1) class action determination and the effect of the Final Consent Judgment entered by the Court below are dealt with in Point III, infra, and in the brief filed on this appeal by the NBA Defendants-Appellees (NBA Br. 41-52, 55-59).

^{**} Judge Carter at the settlement hearing expressly reviewed these <u>Grinnell</u> factors "in determining whether a settlement is or is not, should or should not be approved" (Hearing, JA 1660-61; <u>see also</u>, Opinion, JA 1675-85).



Continued litigation would have only increased that burden and cost. Judge Carter conservatively estimated that it would have required two months "at a minimum" to try just the liability issues (Opinion, JA 1681). Indeed, one non-class action, the Mackey trial, * involving solely the issue of liability as to but one isolated restraint in football, rather than the entire system challenged below in basketball and on behalf of just 16 rather than 479 plaintiffs, took 55 days to try wit out a jury, with 63 lay and expert witnesses and over 400 exhibits. The liability trial before a jury here would have doubtless resulted in even higher statistics.** And, no matter who were to win at the trial level, appeals (to the United States Supreme Court in all likelihood) would be inevitable and would consume years more (JA 1277-78). Thus, absent settlement, the parties would have been in store for three or four additional years of costly litigation. As Judge Moore concluded in Grinnell:

". . . [A] ny suggestion that the alternative to the settlement of these actions is a relatively simple, quickly expedited,

^{*} Mackey v. National Football League, 407 F. Supp. 1000 (D. Minn. 1975), aff'd, 543 F.2d 605 (8th Cir. 1976).

^{**} Of course, even were liability established, the plaintiffs would still be faced with a damage trial, which might require a series of 479 "damage mini-trials" and which the District Court estimated could extend the litigation for many more months (Opinion, JA 1681-82). It was just such factors that led Judge Metzner to approve the class action settlement in Grinnell (356 F. Supp. at 1388-89).

clearly defined pathway is both illusory and naive. On the contrary, it is obvious that litigating these cases to completion would take years — the real questions being how many years, at what cost, and with what result?" (495 F.2d at 468.)

2. Favorable Class Reaction

since only two of the 479 class members filed any stated objections to this class settlement, and no other dissent has been heard, clearly the class overwhelmingly favors the settlement. (See also, JA 1295-97; 1301-07).

Judge Carter found the failure of any other class members to object to be "an unquestionable indication of almost unanimous support for the proposal from members of the class" (Opinion, JA 1682), particularly in view of "the care taken throughout the history of this litigation to keep all members of the class fully apprised of developments, [which] insured that all class members understood what class counsel was doing and enabled each member of the class to make an intelligent assessment of the merits of the compromise proposed" (Id.).

This factor should weigh heavily in this Court's evaluation of the District Court's approval of the settlement, particularly in view of the enormous publicity the settlement received (e.g., JA 1207-10), the Court-approved letters and notices mailed to each class member (JA 1043-51, 1168-69, 1212-13) and the fact that most (if not all) of the class

members have their own individual attorneys (JA 1246).*

Here, only one half of one percent of the class filed objections to the player-negotiated agreement.** In contrast, in Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 803 (3rd Cir.), cert. denied, 419 U.S. 900 (1974), and Muldrow v.

H.K. Porter Co., 20 F.R. Serv. 2d 1069, 1074 (N.D. Ala. 1975), courts approved class action settlements even though approximately 20% of the class members had expressed dissatisfaction.

This Settlement Agreement is the product of many thousands of hours of litigation and negotiation among the very people who are most knowledgeable about professional basketball — the players, owners and league officials and their lawyers. For this very reason, Judge Carter at the settlement hearing recognized that he must afford substantial weight to the views of the principals who were intimately involved in the negotiation of this settlement and who have

^{*} In Flinn v. FMC Corp., supra, the court expressly held that: "The attitude of the members of the class, as expressed directly or by failure to object, after notice, to the settlement, is a proper consideration for the trial court" (528 F.2d at 1173). Under similar circumstances, the Grinnell court noted: "The favorable reception of the settlement offer at the hands of both plaintiffs and the individual attorneys who had little or nothing to do with the negotiation of the settlement is strong evidence that the District Court not only failed to abuse its discretion in approving the settlement but fulfilled its obligation in exemplary fashion." (495 F.2d at 462)

^{**} Indeed, class counsel has been contacted by numerous (footnote continued)

to live under it (JA 1661).* Moreover, counsel for all the parties to the settlement have expressed their support for the Settlement Agreement. As one court stated:

"The court should give great weight to the fact that the lawyers for substantially all the plaintiffs and defendants who have been engaged in this arduous litigation for seven years unanimously support the settlement."

Cannon v. Texas Gulf Sulphur Co., 55 F.R.D. 308, 316 (S.D.N.Y. 1972). See also, Flinn v. FMC Corp., supra, 528 F.2d at 1173; Blank v. Talley Industries, Inc., 64 F.R.D. 125, 132 (S.D.N.Y. 1974).**

3. Extensive Discovery Created A Massive Record

No one can reasonably dispute the enormity of discovery or the extent of the District Court's direct involvement therein through many pre-trial proceedings (JA 1094-

(footnote continued)

class members and their attorneys, both before and after the settlement hearing, inquiring as to the cause of the delay in distributing the settlement fund and expressing the hope that approval by this Court would be forthcoming.

^{*} Recent decisions involving both football and baseball have expressed precisely the same view that the parties involved are much better situated than the courts to restructure the rules relating to the allocation of players' services. See, e.g., Mackey v. National Football League, 543 F.2d at 623; Kansas City Royals v. Major League Baseball Players, 532 F.2d 615, 632 (8th Cir. 1976).

^{**} Of course, a court may not properly substitute its business judgment for that of the parties and their lawyers, even if it were inclined, arguendo, to do so. Zerkle v. Cleveland - Cliffs Iron Co., 52 F.R.D. 151, 159 (S.D.N.Y. 1971); Glicken v. Bradford, 35 F.R.D. 144, 151 (S.D.N.Y. 1964).

1101; 1236-39; Opinion, JA 1668-69). Judge Carter specifically found that "[b]etween March, 1975, and January, 1976, the parties engaged in massive, far-reaching discovery. Approximately 200,000 documents were produced; some 143 persons were deposed; and 45,000 pages of testimony were transcribed" (Opinion, JA 1669). The answer to "[t]he question [of] ... whether or not the District Court had before it sufficient facts intelligently to approve the settlement offer," Grinnell, supra, 495 F.2d at 462-63, is resoundingly yes. Discovery had been completed and the case was nearing trial. Through substantive and procedural motions, every relevant fact had been put before the District Court which, based upon the many hearings, depositions, interrogatory answers, affidavits, exhibits and briefs submitted throughout the history of this lawsuit, was in the best position possible to intelligently approve this settlement.*

The belated claim of objector Chamberlain, raised for the first time on this appeal, that the record is incomplete as to him (Supp. Br. 25-26) is utterly without merit in the face of this massive record. This makeweight contention

^{*} The court in Flinn v. FMC Corp., supra, 528 F.2d at 1173, expressly recognized that:

[&]quot;The fact that all discovery has been completed and the cause is ready for trial is important, since it ordinarily assures sufficient development of the facts to permit a reasonable judgment on the possible merits of the case."

was never even raised by Chamberlain's counsel below. However, Judge Carter did reject a similar claim raised by objector Walker below when he sought to conduct additional discovery, finding that Walker like Chamberlain had "not availed himself of what is virtually a storehouse of available discovery" (JA 1164-66; Opinion, JA 1673; 1683-84).

4. The Risks of Establishing Liability And Damages

While plaintiffs fought hard for over six years in the belief that they would prove liability of the NBA defendants with respect to the original challenged practices, the NBA's many affirmative defenses, which the District Court had refused to dismiss, plus the vicissitudes of and difficulties inherent in a lengthy jury trial on liability and damages were just some of the many factors which militated towards a settlement, which in any event eliminated or modified all of those practices. Of course, in approving a class settlement, the District Court has neither "the right [n]or the duty to reach any ultimate conclusions on issues of fact and law which underlie the merits of the dispute." See Grinnell, supra, 495 F.2d at 456 and the cases cited infra in Point II. And, as Judge Wyatt has noted:

"It is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced."*

Moreover, Judge Carter did find "risks to the class of establishing liability absent a convincing showing that the disputed practices constitute a per se violation of the Sherman Act" (Opinion, JA 1678). Plaintiffs' ability to make such a showing was questioned by Judge Carter on several occasions (e.g., 389 F.Supp. at 896; JA 504-07; 1141-42).**

Per se analysis was expressly rejected by the Eighth Circuit in Mackey (543 F.2d at 618-20), which required a rule of reason analysis after a full trial.***

In addition to the open issues of liability which the District Court found still existed (Opinion, JA 1670), plaintiffs and Judge Carter recognized the risks in proving to a jury the amount of damages of each of the 479 class members (JA 1679-80). The NBA defendants, like the defendants in Grinnell, stood "ready to contest each of the . . . claims

^{*} State of West Virginia v. Chas. Pfizer & Co., supra, 314 F. Supp. at 743-744. Judge Wyatt specifically pointed to Piccard v. Sperry Corp., 36 F. Supp. 1006 (S.D.N.Y.), aff'd, 120 F.2d 328 (2d Cir. 1941), and Upson v. Otis, 155 F.2d 606 (2d Cir. 1946), two cases in which settlements were disapproved because of the "merits" of the plaintiffs' cases only to have the plaintiffs ultimately lose totally or recover substantially less after trial.

^{**} This Court must note that in attempting to establish liability here, plaintiffs did not have the benefit of any prior government lawsuit, and indeed, this was the first action filed anywhere alleging these claims (JA 1085).

^{***} The issue of per se illegality in basketball is discussed in detail in Point II, infra.

on the amount of damages, even though liability may be proven" (356 F. Supp. at 1388). In this regard, the relevance of the jury decision in Kapp v. National Football League, No. C-72-537 (N.D. Cal. 1976), which was reached prior to submission of this settlement, cannot be underestimated. There, the jury, after a three week trial solely on the issue of damages (antitrust liability had already been found), awarded no damages to the sole plaintiff, a football player, who had been totally excluded by a blacklist from playing in the NFL. Judge Carter believed that the result in Kapp "strongly suggests that there is no certainty that plaintiffs will succeed on their damage claims" (Opinion, JA 1679). The result in Kapp is particularly important in weighing the unsupported claims of Walker and Chamberlain that their settlement shares are insufficient.* Other courts have properly looked to the difficulty of establishing damages of a class in approving class action settlements. Grinnell, supra, 356 F. Supp. at 1388-89; Cannon v. Texas Gulf Sulphur Co., supra, 55 F.R.D. at 316. In the face of such

^{*} Neither Walker nor Chamberlain was excluded from the NBA. They each already had signed no cut contracts several years before their recent disputes arose, which would have enabled them to earn their full salaries in the NBA had they merely shown up to play (JA 1256-70; 1320-34; and see NBA Br. 9-10, 12-13). Thus, under governing legal principles, their claims of "special" damages are tenuous at best. Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp., 178 F.2d 150, 153 (2d Cir. 1949) (victim of alleged antitrust violation has a "duty to minimize...damages"); American Can Co. v. Russellville Canning Co., 191 F.2d 38, 55 (8th Cir. 1951) (antitrust plaintiff "may not recover for losses which are readily preventible or avoidable.")

authority, objectors contention that the entire settlement should be overturned because their individual damage shares are inadequate is wholly inappropriate and should be rejected.

5. The NBA Defendants' Financial Posture

The NBA defendants' financial situation (i.e., their ability to pay a judgmert) is also a factor which the Court below properly considered in approving the Robertson settlement. Indeed, "[c]ommon sense seems to dictate the necessity, to say nothing of the propriety, of such a consideration."

Grinnell, supra, 495 F.2d at 467.* In this regard, Judge Carter found that:

"The economic hazards of member clubs making a profit are underscored by the fate of the American Basketball Association, the NBA's rival league. That league has folded and only four of its teams, now in agreement with the NBA, are viable franchises. Under the circumstances, the financial aspects of the settlement seem a reasonable exaction from defendants for the price of peace" (Opinion, JA 1679).

In determining whether the NBA defendants could withstand a substantial money judgment (assuming one was ordered by the jury after trial) and if so, how much, the player-negotiators and class counsel considered the following

^{*} See also, Protective Committee for Independent Stock-holders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968) (the court must consider "the possible difficulties of collecting on any judgment which might be obtained" in approving the terms of a settlement); Grunin v. International House of Pancakes, supra, 513 F.2d at 125; In re National Student Marketing Litigation, 68 F.R.D. 151, 156 (D.D.C. 1974).

factors: (1) the concurrent demise of the ABA and the World Football League as viable sports leagues (JA 1297); (2) the defendants' finances on a team by team and overall league basis as disclosed in discovery; and (3) the representations made by defendants in the course of arm's-length negotiations in which the settlement offer increased from \$1.8 million to \$4.3 million (JA 1283-85). Based on these factors, plaintiffs concluded that the settlement is fair, particularly in light of the fact that even under the most conservative of computations, the class prior to settlement had already received at least an additional \$10 million through increased salaries during and as a direct result of this action (JA 1283). Also, the financial well-being of the entire class (both present and former players alike) in the future is inextricably intertwined with the continued financial wellbeing of the league and its member teams.* Under these circumstances, and given the future economic benefits to be derived from the wide ranging injunctive relief provided by the Settlement Agreement, the National Student Marketing court's warning against "converting any fought for judgment into a mere Pyrrhic victory" is particularly appropriate (68 F.R.D. at 156).

^{*} Player salaries will continue to increase due to the elimination and modification of the NBA's allocation rules. In addition, former players and class members alike must look to the NBA for their substantial accrued and future pension and severance benefits (JA 1283-84).

6. The Substantial Settlement Fund Amount

Obviously, the total amount of the Settlement

Fund is a major factor which must be weighed in determining
the fairness of the proposed settlement. In this regard,

Judge Carter held:

"When the risk to the class attendant upon establishing liability and convincing a jury that professional basketball players, who are currently earning extremely high salaries, should be awarded money damages from the NBA, a 5 million dollar settlement fund seems certainly a reasonable compromise which the class can accept as a wise alternative to the risks of a trial on the merits." (Opinion, JA 1679-80)*

But, this is just one aspect of the entire package of benefits resulting from the institution of this action and the Settlement Agreement. The other benefits unrebutted in the record on which the District Court relied — the maintenance of competition between the NBA and ABA since 1970 and the modification of restrictive practices within the NBA during the course of the lawsuit — have already bestowed significant economic benefits on the class at a bare minimum of \$10 million (JA 1104-09; 1283). When added to the settlement fund plus fees, the total package of already accrued monetary benefits totals some \$15.2 million or more. The total elimination or substantial modification of the challenged NBA rules in the

^{*} The Court's reference to "more than 5 million dollars" reflects class counsel fees and expenses to be paid by the NBA defendants in addition to the \$4.3 million settlement fund (Opinion, JA 1679).

settlement will bestow substantial future economic benefits.*

Significantly, objectors have never suggested that the total amount of the settlement fund is inadequate.

Rather, they complain that in light of their supposedly "unique" circumstances, their allocated shares are inadequate (J. Br. 14; Supp. Br. 26-27).** This unsupported assertion is based primarily on the assumption that were these objectors permitted to prosecute their individual actions, they would be able to prove damages substantially in excess of their settlement shares (J. Br. 13-15; Supp. Br. 26-27).*** This assumption

(footnote continued)

^{*} It should be noted that counsel for Walker and Ray on this appeal in 1971 filed a separate antitrust action containing allegations virtually identical to those herein on behalf of another class member, Wali Jones. He settled that case by stipulating to a dismissal with prejudice, without changing any of the restraints, and received zero damages (JA 1285). Mr. Jones nevertheless receives more than \$27,000 under this Settlement Agreement (JA 1381), which the same counsel is now attacking.

^{**} This "uniqueness" contention regarding appellants' alleged antitrust claims was expressly rejected by the Court below (JA 845-48; 1156-57; 1343-44; Opinion, JA 1683), and is thoroughly refuted by the arguments contained in the NBA defendants' brief (NBA Br. 59-65).

^{***} Walker complains that he will receive only approximately \$29,000 in settlement, but he fails to note that this sum is the third highest settlement amount received by any class member and is within \$1,000 of the highest amount received. Chamber-lain's nearly \$27,000 recovery is the sixth largest amount received by any class member. In each case, these amounts are about three times the average settlement figure and about eight times the median figure. To be compared with these high settlement shares is the average settlement share of only \$635

is not supported by a shred of evidence in the record; to the contrary, the record demonstrates that both Chamberlain and Walker could have earned their alleged "special damages" had they desired to do so simply by showing up to play in 1975 under their guaranteed contracts.

The objectors also claim that they are entitled either to a greater recovery than other class members or the application of a different settlement formula because of their supposed "superstar status" (J. Br. 14).* They have offered no factual or legal support for this bald assertion, and such claim is directly controverted by the sworn statements in the record of "superstar" class members Oscar Robertson and Bob Lanier (JA 1301-07). Moreover, Judge

(footnote continued)

approved in Grinnell, supra, 495 F.2d at 458 (see JA 1279-80).

These objectors also ignore the substantial economic benefits which inured to them as a result of the injunction against the NBA-ABA merger which maintained inter-league competition during the pendency of this lawsuit. Thus, objector Walker's salary rose from \$55,000 in 1969 to \$165,000 in 1974 (an increase of more than 300%) (JA 1256). Likewise, objector Chamberlain's salary increased from \$200,000 to \$450,000 during the same period (an increase of more than 200%) (JA 1266).

* The objector's statement (J. Br. 14) that "[t]he settlement fund will be allocated according to seniority" is false and misleading. While it is true that the settlement formula is based upon the 1966-76 damage period, different years have been assigned different values in the settlement formula in recognition of the varying extent of competition for players' services in professional basketball during those ten years (JA 1052-56). Indeed, the formula works to the direct benefit of these objectors since the earlier years in which they played have been assigned higher values.

Carter expressly rejected this notion, finding that:

"There has been no indication during the course of the suit that the higher-salaried players have been more severely injured. Moreover, the method adopted seems a more democratic and a more equitable division among members of the class." (Opinion, JA 1684-95)*

This Court approved the apportionment of settlement funds under a formula much less responsive to class members' differing competitive circumstances than the equitable formula to be used here (JA 1053-55) in Grinnell** and in the

"the across-the-board nature of the settlement might be objected to because some claimants will receive less than they are entitled to . . . while others will receive more. . . . However, the formula adopted is the only realistic one to be considered in determining whether the settlement should be approved." (356 F. Supp. at 1389)

Appellants' reliance on Smith v. Pro-Football, Inc. 420 F. Supp. 738 (D.D.C. 1976), appeal pending, is misplaced. That case involved damages to a single football player who played in an era (1968) of no interleague competition for players' services, unlike the 1967-76 era of fierce inter-league competition in basketball. Smith, unlike these high-salaried objectors, had no guaranteed contract, was physically injured and was thereby prevented from earning a living. That case did not apply any special weighted damage formula for "blue chip" or "superstar" players. Further, the decision in Smith illustrates the exhaustive and laborious proof requirements necessary to establish the damages of even one player much less 479, as here. Finally, the Smith damages were determined by the judge. The Kapp case, in which no damages were awarded, is demonstrative of the risks inherent in attempting to prove any damage at all to a jury, as Judge Carter recognized (JA 1678-79).

^{**} The district court in <u>Grinnell</u> expressly found:

Antibiotic Drug Cases. See Alpine Pharmacy, Inc. v. Chas.

Pfizer & Co., 1973-1 CCH Trade Cases ¶74,350 at p. 93,634

(S.D.N.Y. 1972), aff'd, 481 F.2d 1 5, 1047 (2d Cir.),

Cert. denied, 414 U.S. 1092 (1973). There, Judge Wyatt noted that such a formula, "makes it unnecessary to determine the actual damages of each claimant, a task which would be beyond the capacity of this Court to accomplish" (supra at p. 93,634). In affirming, this Court observed that "it seems likely to us that the only manageable way of allocating the settlement fund was through such a formula" (481 F.2d at 1047). In light of the inherent fairness of the settlement formula under all the circumstances here and the fact that no more rational basis exists for determining each class member's share in the settlement fund, the Court below clearly did not abuse its discretion in approving such a formula.

7. Considerations of Judicial Economy

Another critical factor considered by the Court below is the impact of this settlement (as opposed to lengthy liability and damage trials and inevitable appeals) on the judicial system. This Court in <u>Grinnell</u> expressly upheld Judge Metzner's consideration of this factor (495 F.2d at 467). Judge Metzner had found that, with 14,000 class members, even a damage trial of as little as one hour for each would result in 14,000 trial hours — or some 11 years of litigation (356 F. Supp. at 1388-89). In our case, some 479

such damage trials after a lengthy trial on liability and following further discovery as to each class member's damages, to be followed by appeals, as well as proceedings before the NLRB and appeals therefrom would impose years more of burden on the judicial system. When this factor is viewed in conjunction with all the other factors discussed <u>supra</u>, it is clear that the District Court correctly applied the governing standards for the approval of class action settlements and its finding that the settlement is fair, reasonable and adequate was not an abuse of discretion, and was the only conclusion possible.

II. THE DISTRICT COURT PROPERLY APPROVED THIS SETTLEMENT WHICH ELIMINATED OR SEVERELY MODIFIED THE CHALLENGED PRACTICES -- NO ILLEGALITY INHERES IN THE SETTLEMENT AGREEMENT.

What the objectors are really complaining about here is not the fairness of the settlement, but rather the effect of the one-year option clause in their contracts. It was that clause which bound Walker and Chamberlain to their teams and prevented them from negotiating with other NBA teams for the 1975-76 season (JA 1257-67). They know, however, that no court has ever ruled that the one-year option alone is illegal or has ever been enjoined (JA 1148-49; 1261), and they even cite cases which upheld the validity of such an option (Supp. Br. 27, n.2). Moreover, Judge Carter told them specifically

that the one-year option had to be tested at a lengthy trial involving the entire player allocation system (JA 1141-44). In any event, that option clause has been forever eliminated pursuant to the Settlement Agreement (JA 870-73; 901). Accordingly, objectors are forced to manufacture the existence of putative per se illegality, contending that the Court below erred in not requiring the immediate abolition of each and every challenged restraint (J. Br. 3-6; Supp. Br. 32), and that the Settlement Agreement should be voided as containing "likely" violations of the Sherman Act (J. Br. 3).* However, no facts in the record or citation to a single case dealing with the modifications contained in the settlement support this position.

These objections to the prospective aspects of the Settlement Agreement reflect a misunderstanding of the proper role of the courts in reviewing class action settlements and show a lack of comprehension about the package of restraints which existed at the time this action was filed (JA 1247-49), how those restraints changed during the course of and due to this litigation (JA 1250-52) and how those restraints have

(footnote continued)

^{*} It is doubtful whether objectors Walker and Chamberlain (aged 37 and 40 respectively) have standing to attack those aspects of the settlement relating to prospective relief. Both were already drafted into the NBA more than 15 years ago and will not be the subjects of any future draft (JA 1274). Both have retired from basketball and cannot be affected by the NBA's compensation rule or first refusal rule (first applicable when they are aged 41 and 44) in whatever form they take (JA 1258; Supp. Br. 28). The record is replete with admissions that Walker only wanted to finish playing one more

been eliminated or radically modified by the settlement (JA 1250-53). These new provisions which plainly protect the economic rights of all players have never even been examined, much less found illegal, by any court.

The Court below properly viewed this class action settlement as an integrated whole (Opinion, JA 1676) involving permissible and salutary system-wide restructuring of the NBA player allocation rules (Opinion, JA 1680-81). And, it properly refused to pick and choose among the settlement terms and hold a trial as to each of them to satisfy the objectors' hope that after such a trial the charge of perpetuating an illegality might be sustained.

The role which the objectors would have this Court play in deciding the merits upon review of the settlement's approval flies in the face of unanimous authorities holding that the purpose of class action settlements is to avoid having appellate courts try the merits of antitrust cases.

See, e.g., City of Detroit v. Grinnell Corp., supra, 495 F.2d at 456; State of West Virginia v. Chas. Pfizer Co., supra, 314 F. Supp. at 741, aff'd, 440 F.2d at 1086. This Court admonished in Grinnell:

(footnote continued)

year -- 1975-76 (e.g., JA 825). The mere fact that they are members of a class herein does not give them standing to challenge those provisions of the settlement which do not in any way affect them. Muldrow v. H.K. Porter Co., 20 F.R.Serv. 2d 1069, 1074 (N.D.Ala. 1975).

"It cannot be overemphasized that neither the trial court in approving the settlement nor this Court in reviewing that approval have the right or the duty to reach any conclusions on the issues of fact and law which underlie the merits of the dispute." (Id. at 456)

Accord, Grunin v. International House of Pancakes, supra, 513 F.2d at 123-24; Young v. Katz, 447 F.2d 431, 433 (5th Cir. 1971).

The <u>Grunin</u> case stands directly against objectors' request for <u>de novo</u> review of the settlement's merits because of alleged "likely" antitrust violations. <u>Grunin</u> involved a class action on behalf of present and former franchisees seeking damages and injunctive relief relating to a complex system of allegedly illegal tying arrangements contained in fr. hise agreements. The suit originally was settled for a cash payment to the class of some \$4 million, but that settlement did nothing to modify or eliminate any of the tying arrangements and barred class members from seeking further injunctive relief. The district court in <u>Grunin</u> understandably refused to approve the settlement and was affirmed on appeal. <u>In re International House of Pancakes</u>,

Thereafter, a second settlement proposal was submitted providing for modification of only <u>some</u> but <u>not all</u> of the tying arrangements (and a reduced settlement fund of only \$500,000, plus attorneys' fees). Objections were

interposed asserting that the settlement provisions violated the antitrust laws because they perpetuated illegal tying arrangements. The Eighth Circuit, applying the governing standards applicable in this Circuit, rejected the claim of antitrust violations and affirmed the district court order approving the settlement:

"[T]he alleged illegality of the settlement agreement is not a legal certainty." (513 F.2d at 124)

Significantly, in approving a settlement which left standing a system that included many of the challenged tying arrangements with no relaxation and others in only slightly less restrictive form, the <u>Grunin</u> court refused to engage in the exercise of determining whether the restraints which pre-existed and which were perpetuated by the settlement were <u>perseconde</u>

The <u>Grunin</u> court specifically noted the vigor with which defendants had contested the claim of illegality, the existence of a variety of possibly applicable affirmative defenses and the relatively full development of the record

^{*} Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

during pretrial discovery. Accordingly, it upheld the settlement under the <u>Grinnell</u> standard and refused to order a trial to determine the legality of the surviving tying arrangements just to satisfy the objector.

The rationale of <u>Grunin</u> applies <u>a fortiori</u> to the settlement here and prevents the objectors from forcing the entire class to the risks of trials and appeals of years' duration, which the settlement avoided. Here, just as in <u>Grunin</u>, Judge Carter was well aware of the intensity and extent of discovery, the vigor of defendants' position as to the legality of the challenged restraints and the existence of numerous affirmative defenses which would all have to be determined at a jury trial (Opinion, JA 1677-79).

The District Court here repeatedly refused to hold even the old, more restrictive system illegal per se without a full scale trial on the merits (JA 1273-74),* and the Eighth Circuit in Mackey specifically rejected a per se

Są.

^{*} The old system had (a) the college draft, which gave one team the exclusive and perpetual right to a prospective player's services (JA 1247); and (b) the reserve system, which as a practical matter granted a team exclusive and perpetual rights to a player once under contract (JA 1247-48). In refusing to grant the NBA and ABA an exemption from the antitrust laws for their proposed merger unless the intra-league practices were modified, Congress recommended changes in those practices, including the elimination of compensation (as was accomplished here) and the retention of limited one-year options, virtually eliminated by the settlement here. Significantly, Congress never advocated any change in the old college draft (JA 93-96); here the draft was significantly modified in favor of rookie players.

analysis of alleged antitrust violations in professional sports. Mackey v. National Football League, supra at p. 620) As shown below, none of the changed practices contained in the Settlement Agreement, whether taken alone or together, has ever been held to be a per se violation or even been examined under such a standard. Under such circumstances, it is frivolous to claim that the per se illegality of the new system which provides for the complete elimination or radical modification of the components of the old system (JA 1108-09; 1250-53) and fosters players' economic rights, is a "legal certainty" as required by Grunin (id. at 124) particularly in light of the objectors' failure to offer a scintilla of evidence or law to support such claim (Opinion, JA 1671).

The objectors' attack on the revamped college draft provision in the Settlement Agreement is based entirely on their erroneous assertion that "[p]recisely this type of college draft was deemed a violation of the Sherman Act" in the Smith case (J. Br. 4). To the contrary, the football draft held illegal in Smith was the very one eliminated by the settlement here. Under that former draft, exclusive draft rights to negotiate with a player were retained by one team forever.*

In contrast, the instant settlement places a one year limit

^{*} I.e., if a player could not agree to a contract with the team which drafted him, he could never play for any other team.

on such draft rights. If the drafted player and team cannot agree upon contract terms, all draft rights lapse and the player is subject to a second and last, one year draft. If the second drafting team does not sign the player, he is free to sign with anyone (JA 863-67; 1251). Obviously, the risk of losing the exclusive right to negotiate creates a substantial impetus to the drafting team to negotiate in good faith. No such impetus existed in the professional football draft ruled upon in Smith,* or in professional basketball prior to this settlement. The Court below expressly found that "[t]he settlement effectuates a radical modification of the disputed practices in respect of the college draft" (Opinion, JA 1680).

In fact, the Settlement Agreement was amended with District Court supervision after its initial submission for approval, at the insistence of class counsel. This new provision further protects drafted players by requiring drafting teams to offer rookies either short term contracts (permitting free agent status after only two seasons) or long term contracts containing substantial salary terms and guarantees (up to \$500,000 in some cases). Absent such offer, rookie players now will immediately become free agents (JA

^{*} In any event, <u>Smith</u>'s <u>per se</u> analysis of professional football's allocations rules has been rejected by the Eighth Circuit in <u>Mackey</u>, <u>supra</u> at p. 618-20.

911(a); Opinion, JA 1680-81).* No such provisions existed to protect players in football like Smith or in basketball prior to this settlement, and Judge Carter specifically noted that in view thereof the new draft "coincides with the court's understanding of the demands of the antitrust laws" (Opinion, JA 1680, n.1). Certainly, this new, less restrictive alternative to the old draft rule comports with the Mackey court's test of reasonableness (543 F.2d at 621-22). Furthermore, the old draft never may be reimposed (JA 901).

In all events, since Judge Carter had already ruled that the old perpetual draft was subject to defenses of reasonableness (JA 504-07), the change to a lesser (more limited) draft right a fortiori requires the conclusion that the new draft must be tested by the rule of reason standard. In applying the Grinnell and Grunin principles, Judge Carter properly overruled the objections to the new draft.

The next restraint challenged by the <u>Robertson</u> complaint was the reserve or option clause. Originally, it was of perpetual duration but was changed as a result of this

^{*} The objectors, both in the District Court and on this appeal have consistently ignored the fact that the Settlement Agreement also eliminates in its entirety the so-called "hardship rules" which in the past had precluded some players from entry into the NBA at all (JA 1250-51).

action to a one-year option.* Judge Carter, as noted <u>supra</u> at p. 27, specifically refused to hold that the one-year option was <u>per se</u> illegal and would not enjoin it as a matter of law (389 F. Supp. at 896; JA 1141-43). Nonetheless, the settlement eliminated virtually all option clauses forever (JA 870-873, 901, 1199).**

Objectors' contention that the new compensation rule, temporarily retained by the Settlement Agreement, is per_se illegal is also untenable.*** Judge Carter refused to

^{*} Chamberlain errs in characterizing this change (Supp. Br. 27, n.2). The cases he cites show that the option clause had been construed prior to the settlement as a one-year option but only when a player sought to leave the NBA for a rival league. Until September 1971, however, a player was never free to move to another team within the NBA. In September 1971, the NBA, in response to this antitrust action, changed from a perpetual to a one-year option as applied to intra-league movement as well (JA 1251-52). Chamberlain's arbitration of his contract claim (JA 204, 227-28) followed by more than two years and applied this change. The cases cited by Chamberlain are instructive, though, since both rejected challenges to the very option clause which forms the basis of these objectors' appeal and which plaintiffs here have successfully eliminated as part of the settlement.

^{**} A one-year option is a restraint, which nonetheless had been judicially enforced against players. See cases cited at Supp. Br. 27, n. 2. Thus, the players were protected and benefitted by the Settlement Agreement's immediate elimination of a restraint probably not even subject to per se attack.

^{***} Indeed, even their description of the compensation rule is incorrect (J. Br. 3, n. 2). The compensation rule applies only after a player signs a contract with a new team, and compensation is payable or can be awarded by the NBA Commissioner only after the player has joined his new team (JA 873). Neither the settlement's compensation rule nor any form thereof will "continue until 1987" as claimed (J. Br. 3, 5). Rather the Settlement Agreement provides for the elimination of that rule after its last use following the 1980-81 season (JA 1252).

find the old compensation rule in basketball per se illegal (389 F. Supp. at 896). The Eighth Circuit in Mackey, the sole authority relied on by objectors, likewise rejected per se illegality as to football's analogous rule (543 F.2d at 620).

A fortiori, the instant compensation rule (which, as described below, is less restrictive than the old one) cannot be per se illegal. Objectors thus have failed to satisfy the Grunin test, supra.

Objectors state that the settlement's compensation provision "contains none of the less restrictive alternatives suggested by the Eighth Circuit in Mackey" so as to bring such a practice within the rule of reason (J. Br. 5). They misunderstand the settlement terms. Unlike the old compensation rule, the new rule, first, is not "unlimited in duration", since it will be eliminated entirely within four years and may never be reimposed (JA 901). Second, it is now accompanied by procedural safeguards referred to in Mackey, since the Settlement Agreement expressly provides that compensation is not required in all cases, precludes the use of any penal compensation in any case (JA 1252, 873), and provides for an expedited hearing to review any alleged improper application of the rule (JA 905-07). Football's Rozelle Rule had no such safeguards.

Finally, the <u>Mackey</u> court held the unmodified Rozelle
Rule unreasonable because of its operation within the context
of the entire unchanged system of NFL restraints -- unreasonable

because it was "employed in conjunction with other anticompetitive practices such as the draft [and] ... option clause" (see J. Br. 5). In contrast, however, as noted above, the instant settlement provides for a phaseout of compensation in the context of the complete elimination or substantial modification of these other practices in the NBA.

Practical considerations also influenced the class to agree to the temporary retention of the new, less restrictive compensation rule. The District Court had made it plain that it would not enjoin operation of the old compensation rule until completion of a full jury trial on all aspects of the case, including the rule of reason and alleged labor defenses (JA 504-07). Such trial surely would have exceeded the 55 days necessary for the Mackey trial which was not tried to a jury and which tested only football's compensation rule and not a sport's entire player allocation system as in Robertson.* The trial in turn would have inevitably been followed by lengthy appeals to this Court and likely the Supreme Court as well, taking three years or more (JA 1277), during which time enforcement of relief likely would have been stayed as had been ordered by the trial court in Mackey (407 F. Supp. at 1011).

^{*} Trial of the Robertson case would have also entailed trial of the separate and complex antitrust action by the ABA against the NBA -- a trial which was avoided only by virtue of the settlement here (JA 1249).

So even had the players ultimately won, the compensation rule would not have been eliminated in its entirety until 1980 when it ends anyway under the settlement terms. This Court in <u>Grinnell</u> refused to blind itself to such realities when passing upon settlements, specifically holding that consideration of "[s]uch necessitous judicial delays" was one factor that should "weigh strongly in any decision to accept a settlement." (495 F.2d at 457.)

Further, ample authority supports the District Court's power to postpone elimination even of a practice, unlike here, previously held to be illegal. In Cranston v. Hardin, 504 F.2d 566, 573-75 (2d Cir. 1974), this Court affirmed a district court order which had stayed the immediate elimination of certain price differentials previously declared illegal on an earlier appeal in favor of the gradual phase out of those differentials. Judge Mansfield held: "Adoption of the parties' proposal for a gradual elimination of the illegal differential was not clearly beyond the jurisdiction of the district court, which is vested with broad discretion to frame decrees adopting flexible remedies for statutory or even constitutional violations of longstanding." (504 F.2d at 574.) Cranston controls here since there has been no finding of illegality and indeed, the District Court previously declared that "no tentative conclusion as to the reserve system's legality will be projected prior to trial on the merits" (389 F. Supp. at 896).*

The objectors' attack on the right of first refusal, which will not come into being until 1981 (JA 1253), is also misguided (J. Br. 3-4). The right of first refusal, which is commonplace in most commercial settings, was universally hailed as a major breakthrough in the context of negotiating freedom in professional sports. That new rule provides that at the end of his contract term, a player will be free to negotiate with every team in the league to determine the best offer available; his old team can retain the right to sign the player only by matching or exceeding that offer, including its non-salary terms; and a player's new team has no duty to compensate the old team in any way (JA 1253, 875-76). Since this new provision, which has never even been challenged, much less held illegal, guarantees every player unfettered negotiating rights and a contract equal to the best offer available in a free market, and thus is designed to prevent any economic injury, it can hardly be deemed a creation of a per se anti-

^{*} Objectors' unsupported assertion that "[p]rofessional hockey players are ... free from the shackles of the compensation rule" (J. Br. 5) is also untrue. Hockey today has a "high-low" reserve compensation rule which is much more restrictive than the NBA compensation rule temporarily provided for in the settlement and which cannot be applied in basketball during the four-year phase out period. Likewise, objectors' statement that "the college draft and the compensation rule have been eliminated from professional football" (J. Br. 5) is equally misleading in light of the Smith and Mackey courts' rulings that these are nevertheless mandatory subjects of collective bargaining.

trust violation.

The parties to this settlement anticipated the Mackey court's express mandate that they settle their differences themselves, since they are better suited than courts to do so (543 F.2d at 623). In recognition of this reality, Judge Carter correctly upheld the Settlement Agreement.

"These terms come to grips with plaintiffs' objections enumerated in the lawsuit, while at the same time seeking to accommodate defendants' contentions that some restrictions or restraints are essential for the survival of the NBA as a viable organization able to field teams that offer truly competitive sports exhibitions." (Opinion, JA 1680-81).*

III. THE DISTRICT COURT DID NOT ABUSE ITS BROAD DISCRETION OR VIOLATE OBJECTORS' DUE PROCESS RIGHTS BY CERTIFYING THIS CLASS PURSUANT TO RULE 23(b)(1)(A) AND (b)(1)(B).

Objectors assert that the District Court abused its discretion in certifying the class under Rule 23(b)(1)(A).**

They readily concede that the District Court properly found

^{*} If this Settlement Agreement really perpetuated or created illegal practices, surely the Antitrust Division of the Justice Department would have stepped in at the District Court level and made the same allegation. The record discloses that the Division stayed abreast of developments in this case for years and even requested and received a copy of the Settlement Agreement, and yet the Division voiced not a single objection to the settlement's terms (JA 1278).

^{**} Objectors repeatedly disregard the fact (J. Br. 1, 3, 9-10; Supp. Br. 2) that the District Court certified this class under both Rule 23(b)(1)(A) and (B), finding that all applicable tests had been satisfied.

a class here, but assert that only (b)(3) certification was appropriate (J. Br. 9; Supp. Br. 32). Further, they claim that failure to provide them with an opportunity to opt out of this class violated their due process rights (Joint Br. 9). The District Court found such contentions meritless (Opinion, JA 1674-76). In certifying the class, Judge Carter specifically ordered the action to proceed exclusively under (b)(1) "so that the opt-out privilege is unavailable" (389 F. Supp. at 903; see also, JA 525-26). For the reasons set forth in the brief of the Defendants-Appellees (NBA Br. 41-52), the objectors are estopped from, and lack standing to challenge this class action ruling. In any event, though, such certification was proper under all applicable authorities and was not an abuse of discretion (Point A, infra). Furthermore, Judge Carter scrupulously protected the due process rights of all class members, including the objectors, by insuring that they were adequately represented, provided with notice and given an opportunity to be heard at all the critical stages of this case, including the settlement (Point B, infra).

A. Certification Under Rule 23(b)(1)(A) and (B) Was Proper.

By this class action which had been authorized by every NBA player but one, plaintiffs and class members together sought to engine an entire system of NBA practices (including the college draft and the reserve system and the proposed NBA-ABA merger), all of which impacted all players

in the same way. The Court below ruled that any judicial resolution of these issues would necessarily and substantially affect the rights of all parties, defendants and class members alike. Until now, all parties, including these objectors and the District Court, recognized that a professional basketball league with numerous teams could not realistically function with different rules and different standards of conduct for individual players and teams -- a likely result if dozens of individual class members were permitted to institute separate and overlapping lawsuits all over the country.

In finding both a (b)(l)(\underline{A}) and (\underline{B}) class, the District Court held:

"That separate actions could establish incompatible standards of conduct for the NBA is well within the realm of possibility. For example, if this action were allowed to continue only for the benefit of the named plaintiffs, it is conceivable that other members of the proposed class would file similar complaints in other courts. The court might grant injunctive relief, another court might refuse, and a third may give relief which differs in material respects from the first. Differing results in the individual actions would impair the NBA's ability to 'pursue a
uniform continuing course of conduct' where pragmatic considerations require that the defendants act in the same manner to all members of the class.

Wright & Miller, supra, Civil §1773, at 10-11. [23(b)(1)(A)] The decision of any court could also, 'as a practical matter,' affect the rights of the class members not before that particular court. [23(b)(1)(B)]" (389 F. Supp. at 901)*

Judge Carter relied on ample authority to support this dual 23(b)(1) ruling. See cases cited at 389 F. Supp. at 901.** See also, Larionoff v. United States, 365 F. Supp. 140, 143 (D.D.C. 1973), aff'd in part, remanded on other issue, 533 F.2d 1167, 1181-82, n. 36, reh. denied, 533 F.2d

"'It would be incongruous and damaging for all parties were the reserve clause and common draft, for example, to be held illegal by one or more courts as to some of the players, but legal by other courts as to other players, or that with respect to some of the players the NBA and ABA could not merge; but as to other players they could merge.' Plaintiffs' Class Action Memorandum at 21." (389 F. Supp. at 901, n. 76)

These risks are further demonstrated by the examples set forth below at pp. 58, n.2 and 59, n.1.

^{*} These risks are not hypothetical. Both Walker and Chamberlain in fact filed separate lawsuits involving many of the same issues being litigated in Robertson, both of which actions were enjoined by the District Court (JA 661, 790, 841, 1337). Judge Carter anticipated this problem and found a (b)(1) class under both subdivisions because:

^{**} The Advisory Committee Notes to Rule 23(b)(1) state aptly with respect to this case that the need for this type of class "is greatest when 'the courts are called upon to order or sanction the alteration of the status quo [the NBA internal practices and the proposed merger] in circumstances such that a large number of persons [all NBA players] are in a position to call on a single person [the NBA] to alter the status quo, or to complain if it is altered, and the possibility exists that [the] actor [the NBA] might be called upon to act in inconsistent ways.'" (39 F.R.D.69, 100)

1188 (D.C. Cir. 1976); American Employers' Insurance Co.
v. King Resources Co., 20 F.R.Serv.2d 161, 163-65 (D. Colo.
1975); Cook Investment Co. v. Harvey, 20 F.R.Serv.2d 612,
614 (N.D. Ohio 1975); Cass Clay, Inc. v. Northwestern Public
Service Co., 18 F.R.Serv.2d 1187, 1188-90 (D.S.D. 1974);
Berman v. Narragansett Racing Assn., 48 F.R.D. 333, 337
(D.R.I. 1969); cf. State of Minnesota v. United States Steel
Corp., 44 F.R.D. 559, 568 (D. Minn. 1968).

These authorities also dispose of objectors' contention that (b)(l) is inappropriate where money damages are sought in addition to other forms of relief (J. Br. 11; Supp. Br. 19).* Larionoff, like Robertson, involved both damages and the application of uniform rules and contracts. The district court there granted (b)(l)(B) class status, stating:

Nothing in the language of the Rule supports the objectors' position. Moreover, had the Advisory Committee intended to exclude money damage claims from the ambit of (b)(1), it would have so stated, as it expressly did with regard to (b)(2) classes (39 F.R.D. at 102), instead of using money damage cases as examples of appropriate (b)(1) cases (id. at 101).

In addition, objectors' contention that only Rule 23(b)(3) could apply because this action "is essentially for damages" (J. Br. 11) disregards the facts that substantial injunctive relief has always been the very heart of this action, that plaintiffs originally sued to enjoin both the NBA-ABA merger and an entire system of NBA practices, and that the Settlement Agreement provers for drastic changes in that system, including the elimination or modification of the challenged restraints.

"This is a matter of law applicable to all parties who are bound by these uniform contracts. Therefore an adjudication with respect to the individual members of the class would as a practical matter be dispositive of the interests of the other members of the class as defined above." (365 F.Supp. at 143) (Emphasis supplied)

The Court of Appeals, in approving that certification, also approved (b)(1)(A) certification because the prosecution of separate actions by class members would create a risk of imposing inconsistent or incompatible standards on the defendant (533 F.2d at 1181-82, n. 36).

Mungin,* like Robertson, involved a suit by a group of employees against their employers seeking an injunction and damages with respect to claimed illegal industry rules and practices. The court reaffirmed its earlier 23(b)(1) ruling precisely because the uniform rules and practices involved impacted the entire class identically and "[t]he possibility of incompatible standards being imposed" existed if separate suits by class members were allowed (318 F. Supp. at 730). Further, the Mungin court, like the Court below (389 F. Supp. at 903), expressly held that a (b)(1) class determination should be chosen over a (b)(3) class where, as here, both are available, "in order to achieve the purposes of the Rule which are to avoid a multiplicity of suits, provide common binding

^{*} Mungin v. Florida East Coast Ry. Co., 318 F. Supp. 720 (M.D. Fla. 1970), aff'd per curiam, 441 ...2d 728 (5th Cir.), cert. denied, 404 U.S. 897 (1971).

adjudication, and prevent inconsistent or varying adjudications" (318 F. Supp. at 730).*

The same result has been obtained in antitrust damage and injunction suits. Jacobi v. Bache & Co., Inc., 16 F.R.Serv.2d 70, 71 (S.D.N.Y. 1971); cf. State of Minnesota v. United States Steel Corp., supra. In Jacobi, Judge Ryan found a (b)(1) class for the same reasons Judge Carter did, holding "that to permit any member of the class to 'opt out' might lead to conflicting and varying judgments in separate actions filed by individual members of the class" (16 F.R.Serv.2d at 71).

Green v. Occidental Petroleum Corp., 541 F.2d 1335

(9th Cir. 1976), does not help objectors. Green involved a

garden-variety 23(b)(3) case. The Ninth Circuit held (b)(1)(A)

certification improper because plaintiffs sought money damages

only for past conduct, and no injunctive or declaratory relief.

There was no possibility of subjecting the defendants to

incompatible standards:

"'Certainly the defendants in [the Green] proceedings can continue the conduct of which the plaintiffs complain even if the plain-

^{*} See also, Zachary v. Chase Manhattan Bank, 52 F.R.D. 532, 534 and fn. (S.D.N.Y. 1971) (where plaintiff sought both monetary and injunctive relief, (b)(1) is appropriate because the challenged practice "is either legal or it is illegal as to all members," and should be applied rather than (b)(3)); Van Gemert v. Boeing Co., 259 F. Supp. 125, 130-31 (S.D.N.Y. 1966); Berman v. Narragansett Racing Assn., supra, 48 F.R.D. at 337; 3B Moore's Federal Practice \$23.31[3].

tiffs are successful...in their individual actions. Their success by its terms does not fix the rights and duties owed by the defendants to others as, for example, would a declaration of the invalidity of the bond issue.' (541 F.2d at 1340, n.10).* (Emphasis supplied)

The Robertson class action does seek "by its terms
...[to] fix the rights and duties owed by the defendants to
others." As objector Chamberlain concedes (Supp. Br. 28),
this action was not limited to damages for past activities
which had terminated, but included a demand for substantive
injunctive and declaratory relief as to an entire ongoing
system of restraints. Indeed, both the settlement and the
objections deal extensively with such relief. Hence, Green by

"It is conceivable, of course, that the claims of named plaintiffs would be so large that if the action were to proceed as an individual action the decision 'would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.' Fed.R.Civ.P. 23(b)(1)(B). This would be the case where the claims of all plaintiffs exceeded the assets of the defendant and hence to allow any group of individuals to be fully compensated would impair the rights of those not in court. See 3B Moore's Federal Practice ¶ 23.35[2] (1975)." (Id. at n.9.)

If players had had the right to sue individually, whenever they chose, as to the same practices, they might well have depleted the defendants' available assets. This obviously would be to the detriment of all class members who suffered from the same practices.

^{*} Green also supports Judge Carter's (b)(1)(B) certification:

its own terms would mandate (b)(1)(A) treatment here.*

Objectors miss the point in asserting (J. Br. 10-11) that collateral estoppel principles would prevent the NBA defendants from relitigating in case 2 a finding of illegality reached in case 1 as to a particular restraint. This truism has no relevance to the policies underlying Rule 23(b)(1).

Objectors ignore the fact that collateral estoppel could not prevent (a) individual players from relitigating seriatim their losses as to a restraint until a determination of illegality is finally made in some court** or (b) the owner-defendants who win a first injunction case on a proposed restraint, as "a practical matter," from thereby adjudicating

^{*} The Green court like the Court below (389 F. Supp. at 903) also recognized that "In cases where both (b)(1) and (b)(3) apply, (b)(1) is held to govern to avoid the multiplicity of suits." (541 F.2d at 1340.)

^{**} Two examples demonstrate why Judge Carter found a (b)(1)(A) class: Assume player A finishes his contract with Los Angeles, signs with Chicago and compensation is demanded under the old rule. He sues to enjoin application of the compensation rule and loses in case 1. Player B finishes his contract with Chicago, signs with Los Angeles, compensation is demanded, he sues to enjoin the old compensation rule and wins in case 2. With respect to the same rule in the same year Chicago winds up having to pay (and the NBA will enforce) compensation as to one player, but is not entitled to receive (or the NBA to enforce) compensation as to the other player. The chaos which objectors advocate also will result if we assume rookie player C is drafted as a first-round pick under the old college draft by New York, sues to enjoin the draft and loses in case 1. Player D is drafted as New York's second pick the same year, he sues to enjoin the draft and wins in case 2. See Advisory Committee Note, 39 F.R.D. at 100. The situation would become even more confusing and disruptive if players B and D sued only for damages, and not for injunctive relief.

the rights of absent players.* That is what (b)(l)(A) and (B), respectively, are designed to prevent when dealing with ongoing or proposed practices. Objectors' view of Rule 23(b)(l) encourages the proliferation of duplicative litigation in direct contravention to the Rule's salutory purpose of preventing multiplicity of lawsuits. See, Mungin v. Florida

East Coast Ry Co., supra, 318 F. Supp. at 730. Adoption of objectors' view would effect a de facto judicial repealer of 23(b)(l)(A) and (B) and would restore the one way intervention which the rule was designed to eliminate. No court would certify a class if a potential class member could simply sit back and wait to see whether plaintiffs in any number of non-class suits won and then commence an action armed with their prior judgment, but still have the option to start his own action even if all the prior plaintiffs lost.**

(footnote continued)

^{*} Another example demonstrates the propriety of (b)(1)(B) certification: Assume player E individually sued to enjoin the merger in 1970 and lost in case 1. That adjudication — permitting the merger to proceed — would as a practical matter have affected the rights of all class members, even though collateral estoppel would not have barred player F in the next case from bringing the same suit to enjoin the same merger, but now after it had already occurred. The Advisory Committee specifically had this type of situation in mind in recommending (b)(1)(B) classes (39 F.R.D. at 100-01).

^{**} These objectors, who originally authorized this class action but who now seek to overturn the settlement and to opt out and to retain the collateral estoppel sword against defendants are no different from class members who have opted out in a (b)(3) case and who then seek to benefit from a judgment that class has obtained:

The collateral estoppel cases relied on by objectors (Joint Br. 10-11) are unavailing; none dealt with much less questioned, the propriety of Rule 23(b)(1) certification in the context of the instant case. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971), a patent case, was not a class action at all and did nothing more than eliminate the doctrine of mutuality of estoppel. In re Yarn Processing Patent Litigation, 56 F.R.D. 648, 652-53 (S.D. Fla. 1972), is another patent case; the court refused to certify any class on several applicable Rule 23(a) grounds. In dictum, the court did indicate that certain (b)(1) suits might be unnecessary in light of Blonder-Tongue, and found that the likelihood of incompatible standards being established in the case before it was remote in any event (56 F.R.D. at 654). Judge Carter reached the opposite conclusion in light of the compelling facts before him (389 F. Supp. at 901). Likewise, the court in Dale Electronics, Inc. v. R.C.L.

(footnote continued)

"To hold that an absentee could so use the judgment in effect would restore a form of one-way intervention, which the amended rule was designed to preclude.
...Notions of collateral estoppel are not so inexorable that a party who has affirmatively sought exclusion from a judgment later will be allowed to rely on it." (7A Wright & Miller, Federal Practice and Procedure, Civil §1789 at 183-84 (1972).)

Electronics, Inc., 53 F.R.D. 531, 534-37 (D.N.H. 1971), met and rejected the same <u>Blonder-Tongue</u> argument and <u>granted</u> certification under (b)(1)(A) and (B), recognizing both the need to avoid burdening the courts with repetitive litigations of the same issue and the problem that the legality of the conduct in issue might be <u>upheld</u> by one or more courts <u>before</u> a successful challenge was made. These same factors and the <u>Dale</u> case were expressly relied on by the Court below (389 F. Supp. at 901, and n. 76).*

B. Objectors' Due Process Rights Have Been Fully Protected.

Objectors' contention that they have been denied due process by the (b)(l) certification is directly contradicted by the governing law and the record in this case. The Supreme Court has set the following alternative test:

"It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually

^{*} Objectors' remaining cases also miss the mark regarding Judge Carter's finding that all requirements of (b)(l) were met: In re Piper Aircraft Distribution System Antitrust Litigation, 411 F. Supp. 115, 117 (W.D.Mo. 1976) (collateral estoppel precludes a putative class representative from obtaining class certification when that identical issue had already been decided against him in a prior litigation); Chevalier v. Baird Savings Association, 1976-2 Trade Cases ¶61,126 (E.D.Pa. 1976) (case inapplicable in light of the NBA's prior successful efforts to enjoin Walker and Chamberlain from prosecuting separate actions and to require them to proceed in Robertson (JA 661, 730, 752, 790)).

participate in the conduct of the litigation in which members of the class are present as parties..." Hansberry v. Lee, 311 U.S. 32, 42-43 (1940) (Emphasis supplied).

Both of these standards were amply satisfied in this case.

First, the entire class has been adequately represented in this action, including the settlement stage. The District Court so held as to the efforts of counsel on the basis of the first five years of litigation (389 F. Supp. at 900 and n. 69) and again in the settlement context (JA 1164). Moreover, Judge Carter found that this case involved an unusually cohesive class (JA 522), and he gave great weight to the fact that active and retired players more than adequately represented the interests of the class members in the litigation (389 F. Supp. at 899; JA 249-87) and in the settlement of the case (Opinion, JA 1670; JA 1254).

Indeed, objectors' counsel have expressly conceded the adequacy of representation during the litigation and its settlement (JA 1261, 1299-1300, 1403, 1627).* None of the other 476 players objected in any way to any of the provisions of the settlement (Opinion, JA 1671). Objectors' position that merely by asserting dissatisfaction with a settlement a class member may overturn a finding of adequacy of representation would, as a practical matter, preclude class action settle-

^{*} E.g., at the settlement hearing, Chamberlain's counsel stated "I don't want to object to what I consider a very good job by counsel for the class" (Hearing, JA 1627).

ments entirely. See Grinnell, supra, 495 F.2d at 464.

Second, <u>Hansberry</u>'s alternative test of notice, participation and opportunity to be heard has been met here.

Walker, a named plaintiff, and Chamberlain expressly authorized initiation of this class action in writing when it was commenced nearly seven years ago (JA 680(x), 816). Throughout the long history of this suit, they, like all players, have been constantly apprised of the status of this suit, including the settlement negotiations and agreement, in meetings, newsletters, reports and telephone calls, not to mention the three official class notices and extensive press coverage (JA 1294-95, 1207-13).

Objector Walker so testified at the settlement hearing (Hearing, JA 1643-46) and Judge Carter expressly so held (Opinion, JA 1670-71, 1675).*

At the direction of the District Court, class counsel mailed to each class member, including objectors, a Notice of Pendency of Class Action containing explicit permission to intervene in the conduct of this litigation (JA 537, 546, 555). None intervened. On March 1, 1976, with Court approval, a letter explaining the agreement in principle was mailed to all class members, including objectors (JA 1168-69; 1212). There-

^{*} These objectors participated directly in the litigation; both Walker and Chamberlain produced documents and were deposed by the NBA defendants (JA 1466; Walker Dep.) and Walker answered a lengthy set of interrogatories (JA 433, 531).

after, all class members, including objectors, were mailed a Notice of Settlement of Class Action explaining the settlement terms and informing them of their right to object and to present evidence at a hearing (JA 1043, 1161, 1212-13). "'The fundamental requisite of due process of law is the opportunity to be heard.'" Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). Because the objectors received ample notice and opportunity to participate and to be heard from commencement of this litigation through its settlement, Judge Carter expressly found that they were afforded due process (Opinion, JA 1676).

Objectors' precise claim -- that preclusion of the opt-out right in a (b)(l) settlement constituted a deprivation of due process -- was recently rejected on the ground that due process requirements are fully met by notice and an opportunity to be heard. American Employers' Insurance Co. v. King Resources Co., 20 F.R.Serv.2d 16l (D.Colo. 1975).* That court also held that a class member claiming special circumstances could be constitutionally compelled to accept a settlement, setting forth four reasons directly applicable here.

"It is true that a party to a suit cannot ordinarily be 'forced' into a

^{*} The Tenth Circuit in the Four Seasons case also rejected a similar argument, holding "that due process may be satisfied by notice alone and that, where due process is thus satisfied, adequacy of representation need not be shown as a matter of constitutional necessity" (502 F.2d at 843). Here there is both.

compromise which conclusively determines his legal interests. The most fundamental concerns of due process demand that he have his day in court or that he voluntarily waive this right by stipulating to a compromise. But class actions are a recognized exception to this general rule. First, there is a strong public policy favoring equitable settlements of complex, multi-party litigation which might otherwise consume 'many months of court time over a period of years.' [In re Four Seasons Securities Laws Litigation, 59 F.R.D. 667, 678 (W.D. Okla. 1973), rev'd on other grounds, 502 F.2d 834 (10th Cir. 1974); see also, Feder v. Harring-ton, 58 F.R.D. 171 (S.D.N.Y. 1972)]. Second, a rule which permitted an objector to 'opt out' or block compromises of 23(b)(1) or (b)(2) actions would invariably result in the collapse of on-going settlement negotiations or would preclude such negotiations entirely. In the words of Judge Frankel, '[this] would put too much power in a wishful thinker or spite monger to thwart a result that is in the best interest' of other parties to the litigation. [Saylor v. Lindsley, 456 F.2d 896, 899-900 (2d Cir. 1972)]. Third, as we have already said, the objector has a right to notice of the proposed settlement and is guaranteed an opportunity to 'litigate' or contest its fairness. Finally, the potential for injustice to an objector is minimized by the court's more active role in the settlement of class actions than in the settlement of other cases." (20 F.R.Serv.2d at 163) (Emphasis in original)*

That court, like the Court below, correctly held that it is the individual class member's right to object to,

^{*} Accord, Research Corp. v. Asgrow Seed Co., 425 F.2d 1059, 1060 (7th Cir. 1970).

not his ability to opt out from, a settlement or judgment that is relevant in satisfying the requirements of due process.*

Since both Walker and Chamberlain together with all class members were given the opportunity to object, they cannot now be heard to complain that their due process rights have been violated. "Seen in this light, the court's approval of a compromise in a class action is akin to a 'litigated judgment,' and a party who is bound, over its objections, to a judgment is not unlike the 'losing' party in a suit decided on the merits" (20 F.R.Serv.2d at 164).

The court in the <u>American Employers'</u> case also expressly rejected objectors' argument that due process demands that a class member must be individually represented throughout the settlement negotiations. The court found that such arguments of alleged inadequacy of representation are addressed only to the fairness of the settlement and not to due process considerations (<u>id</u>. at 164). That court properly applied <u>Hans</u>berry** in holding:

^{*} Rule 23 expressly recognizes this distinction by limiting the right of a party to opt out of (b)(3) actions only (Rule 23(c)(2)), while providing that the right to notice of a proposed settlement for purposes of objecting extends to all class actions (Rule 23(e)).

[&]quot;[T]his Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it." (311 U.S. at 42) (Emphasis supplied)

"that in a class action settlement, an objecting party, can never be an absent member of the class. He receives notice and an opportunity to participate in the determination of the settlement's fairness. In short, an objecting party is not, in a settlement context, dependent upon the representation of some other, possibly hostile party." (Id. at 164)* (Emphasis in original)

See also, In re Antibiotic Antitrust Actions, 333 F.
Supp. 296, 298 (S.D.N.Y.), aff'd per curiam sub nom., Connors
v. Chas. Pfizer & Co., 450 F.2d 1119 (2d Cir. 1971).** There,
the court dismissed a Hansberry-based argument precisely
because, as here, class members were given and took advantage
of the opportunity to object and were therefore deemed not to
be "absent parties" under Hansberry.

Indeed, the court in <u>National Association of Regional</u>
Medical Programs, Inc. v. Weinberger, 396 F. Supp. 842, 846-47

^{*} The notion that this settlement cannot be approved over the objection of a named plaintiff and class representative like Walker (J. Br. 13) was soundly rejected by the courts in Flinn v. FMC Corp., supra, 528 F.2d at 1174, n. 19 (settlement approved even though three named plaintiffs objected) and Boggess v. Hogan, 410 F. Supp. 433, 435 (N.D. Ill. 1975) (settlement approved even though four of the seven named plaintiffs objected). This court, in Saylor v. Lindsley, 456 F.2d 896, 899-900 (2d Cir. 1972), also recognized that the settlement could be approved even if the objector was the sole plaintiff and class representative, rather than only one of 14 plaintiffs to object, as here, so as not to allow a "wishful thinker or a spite monger to thwart a result that is in the best interests of the" class.

^{**} That case involved a Rule 23(b)(3) class suit and a subsequent individual action brought by several class members who had not opted out of the original class, but instead had appeared and objected to the prior class settlement. Those (b)(3) class members are no different than the (b)(1) class members here since both have the same right to object.

(D.D.C. 1975), held that provisions for notice and an opportunity to be heard alone satisfy the requirements of due process in a proceeding to determine not how much (b)(1) class members should receive, but rather how much they could be required to pay.*

The two cases cited by Chamberlain (Supp. Br. 29-31) in fact mandate affirmance of this settlement. Both cases involved the failure of a class representative to obtain any relief for the class. Airline Stewards and Stewardesses Ass'n., Local 550, TWU, AFL-CIO v. American Airlines, 490 F.2d 636 (7th Cir. 1973), cert. denied, 416 U.S. 993 (1974), was an action for injunctive relief and damages on behalf of both former and present employees in which the union was found to be an inadequate representative of the former employees. The claim of inadequacy there was upheld because the union had agreed to a settlement which provided no money damages and no injunctive relief for the former employee class members, after the union had entered into an interim collective bargaining

^{*} Following settlement of that (b)(l) class action, class counsel in Weinberger sought, and the court granted, recovery of attorneys' fees from the individual class members.

[&]quot;[H]aving given each [class member] actual detailed notice of the pendency of the fee proceeding and having given each [class member] the right to participate in this proceeding,...due process has been satisfied...[E]ach [class member] has been before the court on the merits, has benefitted from the court's order requiring obligation of the impounded funds, and has been given notice and an opportunity to participate in the instant proceeding." (396 F. Supp. at 846-47)

agreement protecting only present employees, thereby rendering moot the prospective injunctive aspects of the case.* Similarly, in Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973), inadequacy of representation was found because the named plaintiff failed to appeal an order which denied any retroactive injunctive relief to class members other than him. Both cases are in vivid contrast to this one. The class representatives here succeeded for everyone, including objectors, in keeping inter-league competition for players' services alive and improving intra-league competition during six years of litigation (permitting objectors to earn their large salaries), in radically restructuring an operative system for the future, and in obtaining substantial damages for all present and former players. Indeed, objectors Chamberlain and Walker will receive far larger settlement shares than most other class members because the settlement specifically recognizes the longer period they played under the now removed or modified restraints. There is no inadequacy here -- the problems of non-representation raised by Gonzales and Airline Stewards have never occurred.

Rather, it would be most inappropriate to permit these objectors to upset the settlement at the last minute,

^{*} Unlike Airline Stewards, the players union here was not the class representative. Rather, 14 players represented the class, nine of whom were former players at the time of the settlement. Both past and present players directly participated in the entire settlement negotiation process. Obviously, the interests of all former player class members, including objectors, were well represented.

deprive the whole class of its hard-fought and substantial benefits and throw professional basketball back into turmoil (see pp. 2-3, supra). As the Seventh Circuit declared in Airline Stewards, even in cases where the opt-out right is available,

"situations could arise where individual members of a class so clearly acquiesced in and accepted the efforts of their union or other plaintiff for so long a period and under such circumstances that they would be estopped from exercising their right to exclude themselves and 'spoiling' a settlement obtained by such efforts." (490 F.2d at 643)

These acquiescing objectors should not be permitted so to "spoil" for every other class member this eminently fair and hard fought settlement.*

CONCLUSION

For all the foregoing reasons, the Judgment appealed from should be affirmed in all respects.

Dated: New York, New York February 15, 1977

Respectfully submitted,

Of Counsel:
Ira M. Millstein
Peter Gruenberger
James W. Quinn
Irwin H. Warren

WEIL, GOTSHAL & MANGES Attorneys for Plaintiffs-Appellees 767 Fifth Avenue New York, New York 10022 (212) 758-7800

^{*} If objectors' claims are really "unique", as for example if they have contract claims (JA 1268-69), nothing in the settlement prevents them from pursuing such claims.

(3) C BY RECEIVED

3-15 1977

1 GABLA WEISS. RIFKIND, WHARTON & GARRISON

Prohom Colgency of Autobat

Prohom Line Golg of Match

My Richt L. Wesser

They 15, 1977

(5) - Y RECEIVED

3-15 1977

By Characa A harres

By Characa A harres

2 COPY RECEIVED

HILL, BETTS & NASH

COPY RUBIVED Linda farina
17: 40
2/15/77

TO THE POST OF HILL